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**SHIPPERS AND CARRIERS  
OF  
INTERSTATE AND INTRASTATE FREIGHT**

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**Third Edition**



**SHIPPERS AND CARRIERS  
OF  
INTERSTATE AND INTRASTATE  
FREIGHT**

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**Volume One**

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**By  
EDGAR WATKINS, LL. B.  
OF THE ATLANTA BAR**

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**ATLANTA  
THE HARRISON COMPANY  
LAW BOOK PUBLISHERS  
1920**

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## **PREFACE.**

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No branch of the law is more important than that relating to the rights and duties of shippers and carriers, and no branch of the law is less generally known. The purpose of this book is to assist those who may be called upon to advise as to such rights and duties to an understanding of this interesting phase of the law.

In approaching the subject the experience of an active practitioner was drawn upon to determine what would be most useful, not only to the legal profession, but to traffic men, whether in the employ of the carriers or of those bureaus organized throughout the country to aid and advise shippers.

From this experience, it was thought that where the state of the authorities justified, the law should be given as nearly as might be in the language of the courts of final authority. For this reason, where questions have been definitely determined, liberal quotations have been inserted.

Many questions, however, affecting the subject of this book have not yet been settled. Where this is true, the opinions of the federal courts, the Interstate Commerce Commission and state courts, have been referred to and discussed. In this way it has been sought to deduce the principles of the law.

The Act to Regulate Commerce has been annotated, not only with the decisions of the courts, but also with the opinions of the Interstate Commerce Commission. This will enable one desiring to investigate a particular provision of that act to trace the construction thereof by the references which have been made thereto by the tribunals whose duty it is to enforce this great statute.

The Sherman and Clayton Anti-Trust Statutes, the Twenty-Eight Hour Law, and other acts affecting the question are cited and discussed in so far as they relate to the subject under investigation. Statutes such as the Safety Appliance Acts, the Employers' Liability Act, the Hours of Service Act, the Federal Trade Commission and Anti-Trust Acts, and other acts, a knowledge of which is necessary to those who, as prac-

tioners or otherwise have to do with the enforcement of those laws, or are required to advise or act with reference thereto, are inserted.

Because the conference rulings of the Interstate Commerce Commission are of such general use and are not always available, and adopting the suggestions of lawyers and traffic officials familiar with the practice before the Commission, these conference rulings have been copied at the end of Volume One

While few lawyers have given special attention to the questions here discussed, the widening scope of interstate commerce makes it necessary that all practitioners shall be ready to advise clients as to their rights and liabilities growing out of the law relating to transportation.

Claims for overcharge, for loss and for damage on shipments moving from one state to another arise in the business of most manufacturers, jobbers and merchants. The law fixing the rights growing out of such shipments is found in the statutes and decisions of the Federal Government. To make the Laws more easily available and understandable is the purpose of this work. With what success that purpose has been affected must be determined by those who may make use of what is herein set down.

Intrastate transportation is so closely related to that which is interstate, that a new chapter has been added, in which is discussed intrastate transportation in so far as it affects directly or indirectly the principal subject of the book. The author desires to acknowledge the valuable services of Mr. Mac Asbill who has assisted in revising the manuscript.

EDGAR WATKINS.

Atlanta, Ga., June 1, 1920.

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# Shippers and Carriers of Interstate and Intrastate Freight

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## CHAPTER I.

### STATE REGULATION OF CARRIERS ENGAGED IN INTERSTATE COMMERCE.

- § 1. Scope of Chapter.
- 2. Interstate Commerce Defined.
- 3. Power of Congress Exclusive, When.
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- 11. State Laws Forbidding the Consolidation of Competing Carriers.
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50. Testing a Rate by Use to Determine Whether or Not It Is Confiscatory.
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53. Ferries.
54. Bridges.
55. Regulating Charges for Transportation by Water.
56. Regulating Pilotage, Ports, Harbors and Vessels.
57. Boards of Trade and Exchanges.
58. Inspection. Quarantine, Game, Food, Liquor, and Lottery Laws.
59. Taxation, Including License Taxes.
60. Procedure to Test the Validity of State Regulations.

§ 1. **Scope of Chapter.**—Paragraph 3, section 8, Article 1, of the Constitution of the United States contains the grant of power to Congress over interstate commerce and gives Congress the power “to regulate commerce with foreign nations, among the several states, and with the Indian tribes.”

It is not the purpose of this book to treat of the subject of interstate commerce in its widest scope, the work being confined to a discussion of the rights and duties of shippers and carriers. To determine what these rights and duties are it is necessary to discuss what is interstate commerce, when a carrier is engaged therein, and to what regulations an interstate carrier is subject. That such carrier may, as to that portion of its business which is within a particular state, be subjected to some state regulation is, under the present laws of Congress, indisputable. The extent of this regulation by the state is the subject of this chapter.

It may be said, as a general rule, that the proper state authorities, duly acting, may pass all reasonable laws for the regulation of the health, happiness and safety of its citizens; and such laws and regulations are not invalid merely because they may incidentally affect interstate commerce. It may be further stated that the mere existence of power in Congress to regulate interstate commerce does not exclude the states from the exercise of power over such commerce. In the absence of congressional legislation, or in the absence of action by the Interstate Commerce Commission where the matter has been delegated to it, states may indirectly legislate affecting interstate commerce.

§ 2. **Interstate Commerce Defined.**—Interstate commerce, as defined in the Constitution of the United States, is commerce “among the several states,” but the Constitution does not define commerce. What “commerce” includes cannot be definitely stated or limited. Its primary meaning is traffic, purchase and sale, but it means also intercourse, interchange or mutual exchange of commodities. It includes the carrying by independent carriers of things or commodities which are ordinarily the subject of traffic and which have in themselves a recognized value in money. This intercourse includes all the preliminary, intervening and consummating acts, instrumentalities and dealings that bring about the sale or exchange of commodities. It embraces transportation by land and water and the means and appliances necessary thereto, including transportation of persons and property.<sup>1</sup>

Products of farm, mine, forest or factory can not be said to have entered the field of interstate commerce until actually launched on the way to another state or committed to a carrier for transportation to such state.<sup>2</sup> The sale of such

1. *Gibbons v. Ogden*, 9 Wheat, 1, 22 U. S. 1, 6 L. Ed. 23 (1824); *Lottery case*, *Champion V. Ames*, 188 U. S. 321, 345, 47 L. Ed. 492, 23 Sup. Ct. 321; *Simpson et al, R. R. Com. of Minnesota v. Shepard* (“Minnesota Rate Cases”) 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729, and cases cited; *United States v. Swift & Co.*, 122 Fed. 529, Modi-

fied and subject discussed, *Swift & Co. v. United States*, 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. 276. For a discussion of what transportation is included within the provisions of the Act to Regulate Commerce, see, post, Sec. 67.

2. *McCluskey v. Marysville & N. R. Co.* 243 U. S. 36, 61 L. Ed. 578; 37 Sup. Ct. 374, quoting from

products and their delivery to the purchaser free on board cars in the state of primary production for transmission to another state is equivalent to a commitment to a carrier and constitutes the transaction one of interstate commerce." The Supreme Court<sup>4</sup> in holding that the transmission of information by telegraph was interstate commerce stated as a principle to be applied: "Practice, intent and the typical course, not title or niceties of form, were recognized as determining the character" of any particular transaction.

A transaction not itself within the meaning of the term interstate commerce may be regulated by Congress under the commerce clause. This on the principle that Congress has the power to protect interstate commerce from burdens, although the thing which causes the burden is not such commerce.<sup>5</sup>

The transmission of intelligence by telegraph or telephone is an agency of commerce and intercommunication. The powers of Congress over interstate commerce must "keep pace with the progress of the country, and adapt themselves to the new development of time and circumstances." The

The *Daniel Ball*, 10 Wall 557, 19 L. Ed. 999 and *Coe v. Errol* 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. 475. In the *Daniel Ball* "common" was used before carrier, but it is not believed that such a restriction is legally sound. In *U. S. v. Burch* 226 Fed. 974, 975 District Judge Dooling in holding that taking a woman in an automobile across a state line was interstate commerce said: "Interstate commerce then is, among other things, the passage of persons or property from one state to another. It does not necessarily, or indeed at all, involve the idea of a common carrier, or the payment of freight or fare". This rule was applied to the Transportation of liquors. *Ex parte, Westbrook* 250 Fed. 636.

3. *Penn. R. Co. v. Sonman Shaft Coal Co.*, 242 U. S. 129, 61 L. Ed. 188, 37 Sup. Ct. 45.

4. *Western Union Tel. Co. v. Foster*, 247 U. S. 105, 65 L. Ed. 1006; 38 Sup. Ct. 428 See also *Valley and Siletz R. R. v. S. P. Co.* 53 I. C. C. 397, 399.

5. *Houston E. & W. T. R. Co. v. United States*, 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833. This principle seemingly applicable, (See article by present writer *Case and Comment* April, 1917, P. 906) was disregarded in the *Child Labor Case*, *Hammer v. Dagenhart*, 247 U. S. 251, 62 L. Ed. 1101, 38 Sup. Ct. 529, 3 A. L. R. 649.

6. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 9; 24 L. Ed. 708; *Western Union Tel. Co. v. Texas*, 105 U. S. 460, 26 L.

decisions in the White Slave cases<sup>7</sup> are but an adaptation to modern day developments of the principles stated in *Gibbons v. Ogden*, Note 1 *Supra*.

The importation of films showing a prize fight and the transportation thereof in interstate commerce may be prevented under the commerce clauses<sup>8</sup>.

§ 3. **Power of Congress Exclusive, When.**—Congress alone has power directly to regulate or burden interstate commerce, and as to such direct burden or regulation the power of Congress is plenary, all pervading, exclusive and indivisible. In

Ed. 1067; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 30 L. Ed. 1187, 7 Sup. Ct. 1126; teaching by correspondence schools commerce, *International Text Book Co. v. Lynch*, 81 Vt. 101, 69 Atl. 541. *Shoemaker v. Chesapeake & Potomac Tel. Co.*, 20 I. C. C. 614; regulation by interstate commerce commission of an interstate telephone line; *Postal Tel. Co. v. City of Mobile*, 179 Fed. 955, 960; "Telegraph business is commerce." Messages passing from one state to another is interstate commerce and subject to Federal and free from state regulations, *Western Union Tel. Co., v. Crovo*, 220 U. S. 364, 55 L. Ed. 498, 31 Sup. Ct. 399; *Western Union Tel. Co. v. Commercial Milling Co.*, 218 U. S. 406, 54 L. Ed. 1088, 31 Sup. Ct. 59, Affirming *Commercial Milling Company v. Western Union Tel. Co.*, 151 Mich. 425, 115 N. W. 698. Insurance is not commerce, *New York Life Ins. Co. v. Deer Lodge County*, 231 U. S. 495, 58 L. Ed. 332, 34 Sup. Ct. 167 and cases cited. Wages of railroad employees are within the regulatory power granted by the Commerce Clause. *Wilson v. New* 243 U. S. 332, 61 L. Ed. 755, 37 Sup. Ct. 298.

Other illustrations are: Contracts for vaudeville artists who travel and transport their necessary equipment among the states, *Marienelli v. U. S. Booking Offices*, 227 Fed. 165; Piping gas from one state to another, *Landon v. Public Utilities Co. of Kansas*, 242 Fed. 658; printing, publishing and distributing a newspaper among the states, *Post Printing & Pub. Co., v. Brewster*, 146 Fed. 321.

7. *Hoke v. United States*, 227 U. S. 308, 57 L. Ed. 523, 33 Sup. Ct. 281, 43 L. R. A. (N. S.), 906, Ann. Cas. 1913E 905; *Athanasaw v. United States*, 227 U. S. 326, 57 L. Ed. 528, 33 Sup. Ct. 285; Ann. Cas. 1913E, 911; *Bennett v. United States*, 227 U. S. 333, 57 L. Ed. 531, 33 Sup. Ct. 288; *Johnson v. United States*, 215 Fed. 679. That a state, Congress having acted, may not forbid the importation of women for immoral purposes, is held in *State v. Harper*, 48 Mont. 456, 138 Pac. 495, 51 L. R. A. (N. S.), 157. See also *Caminetti v. U. S.* 242 U. S. 470, 61 L. Ed. 442, 37 Sup. Ct. 192.

8. *Weber v. Freed*, 239 U. S. 325, 60 L. Ed. 308, 36 Sup. Ct. 131, Ann. Cas. 1916C 317; *United States v. Johnston*, 232 Fed 970.

the absence of federal regulation interstate commerce is free from direct regulation. Says Mr. Justice Hughes in the *Minnesota Rate Cases*:'

"There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the nation may deal with the internal concerns of the state, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere. \* \* \* The grant in the Constitution, of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is a exclusive."

9. *Simpson et al., R. R. Co. of Minnesota v. Shepard*, 230 U. S. 352, 399, 57 L. Ed. 1151, 33 Sup. Ct. 729, citing *McCulloch v. Maryland*, 4 Wheat 316, 17 U. S., 316, 405, 426, 4 L. Ed. 579; *The Daniel Ball*, 10 Wall, 77 U. S. 557, 565, 19 L. Ed. 999; *Smith v. Alabama*, 124 U. S. 465, 473, 31 L. Ed. 508, 8 Sup. Ct. 564; *Baltimore & O. R. Co. v. Interstate Com. Com.*, 221 U. S. 612, 618, 619, 55 L. Ed. 878, 31 Sup. Ct. 621; *Sou. Ry. Co. v. United States*, 222 U. S. 20, 26, 27, 56 L. Ed. 72, 32 Sup. Ct. 2; *Mondou v. New York, N. H. & H. R. R. Co.*, 223 U. S. 1, 47, 54, 55, 56 L. Ed. 327, 32 Sup. Ct. 169, 38 L. R. A. (N. S.), 44; *Chicago R. I. & P. R. Co. v. Hardwick Farmers Elevator Co.*, 226 U. S. 426, 57 L. Ed. 284, 33 Sup. Ct. 174; *St. Louis I. M. & S. R. Co. v. Edwards*, 227 U. S. 265, 57 L. Ed. 506, 33 Sup. Ct. 26; *Reversing same style case*, 94 Ark. 394, 127 S. W. 713. In *McDermott*

The statement of this rule in *Western Union Telegraph Co. v. James*<sup>10</sup> shows that as to "those matters relating to commerce which are not of a nature to be affected by locality, but which necessarily ought to be the same over the whole country," failure of Congress to act is "a declaration that in those respects commerce should be free and unregulated by any statutory enactment."

Street railways engaged in interstate commerce cannot be regulated as to their interstate rates by state authority.<sup>11</sup> In the *Shreveport case*<sup>12</sup> rates established under authority of the laws of the state of Texas were maintained by the carriers on intrastate traffic, which rates unlawfully discriminated against interstate rates maintained by the same carriers. Upon complaint to the Interstate Commerce Commission, it was found from the evidence of record that such relationship of rates resulted in undue preference and unjust discrimination, in violation of section 3 of the Act to Regulate Commerce. The carriers defendant contended that the unlawful discrimination, if any, resulted from rates made under authority of the laws of Texas, and that such rates so made were not subject to the jurisdiction of the Interstate Commerce Commission. The contention of the carriers was not adopted, the Supreme Court holding that section 3 prohibited all unjust discrimination, and that the fact that the discrimination arose from intrastate rates did not deprive Congress of the power

*v. Wisconsin* 228 U. S., 115, 128, 57 L. Ed. 754, 33 Sup. Ct. 431, it was said, that Congress has ample power "not only to pass laws which shall regulate legitimate commerce among the states and with foreign nations, but has full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, to make such as are injurious to the public health outlaws of such commerce and to bar them the facilities and privileges thereof"

10. *Western Union Tel. Co. v. James*, 162 U. S. 650, 40 L. Ed.

1105; 16 Sup. Ct. 934, and see *Welton v. Missouri*, 91 U. S. 275, 282, 23 L. Ed. 347; *Hall v. De Cuir*, 95 U. S. 5 Otto 485, 24 L. Ed. 547; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. Ed. 962, 14 Sup. Ct. 1087.

11. *South Covington Ry. v. Covington*, 235 U. S. 537, 59 L. Ed. 350, 35 Sup. Ct. 158.

12. *Houston E. & W. T. Ry. Co. v. United States*, 234 U. S. 342, 58 L. Ed. 134, 1341, 34 Sup. Ct. 833, affirming *Tex. & P. Ry. Co. v.*

“Every person, every corporation, everything within the territorial limits of a state is, while there subject to the constitutional authority of the state government. Clearly under this rule Mississippi may govern this corporation, as it does all domestic corporations, in respect to every act and everything within the state which is the lawful subject of state government. It may, beyond all question, by the settled rule of decision in this court regulate freights and fares for business done exclusively within the state, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi. So it may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. In this way it may certainly require the company to fence so much of its road as lies within the state; to stop its trains at railroad crossings; to slacken speed while running in a crowded thoroughfare; to post its tariffs and time-tables at proper places. and other things of a kindred character affecting the comfort, the convenience, or the safety of those who are entitled to look to the state for protection against the wrongful or negligent conduct of others.”

In the same case, at p. 331, the court showed that this exclusive jurisdiction to act does not mean that the extent of the regulation is itself unlimited. The court said: “From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the state can not require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law.”

States may regulate the commerce within their respective jurisdictions by legislating directly, or they may, as has been done in nearly all of the states, delegate to a board or commission certain powers to prescribe rules and regulations, to fix rates and to exercise a general supervision over the corporations or persons within the regulative jurisdiction. The legislative acts creating commissions and prescribing the

powers and duties thereof must of necessity speak in more or less general terms, for as said by the Supreme Court of Florida:" "The difficulty of making a specific enumeration of all such powers as the Legislature may intend to confer upon Railroad Commissioners for the regulation of common carriers in the interest of the public welfare renders it necessary to confer some power in general terms; and general powers in general terms; and general powers given are intended to confer other powers than those specially enumerated."

§ 6. **All Commerce Subject to Regulation.**—The divisions showing where the power to regulate commerce rests in the different classes named in the three preceding sections, as said by the Supreme Court, "express but the extreme boundaries of the subject."<sup>17</sup> More definite principles must be applied to particular cases. But in all cases the power to regulate rests somewhere.

It must of necessity be burdensome to interstate carriers to be subject to regulation by two governments acting independently of each other, and it is frequently a difficult question to determine which has the power to require a particular act or to make a particular rule. That Congress may extend its power is clearly indicated in the Minnesota Rate cases and the Shreveport case, cited *supra*, and that the extent of the power of Congress under the Constitution may include a scope much wider than has been exercised under the Act to Regulate Commerce and acts supplemental thereto and amendatory thereof, is shown by the decisions of the Supreme Court under the Employers' Liability Acts."

Some of the delicate and difficult questions which arise from the dual regulation of carriers, appear from the result of the decision of the Supreme Court in the Minnesota Rate cases, Sec. 3 *supra*. Duluth, Minnesota, and Superior, Wisconsin, are about 3 miles apart, and each is located on Lake Superior. Rates from and to these ports must of necessity be the same. From Duluth to Minnesota points over one line is an intra-

17. Goods manufactured by child labor could not for that reason alone be denied shipment or sale in interstate commerce. See note 5 *supra*.

18. Southern Ry. Co. v. Reid, *supra*.

19. Sec. 332, *post*. Mondou v. N. Y., N. H. & H. R. Co., Second Employers' Liability Cases, 223 U.

state movement; over other lines such movement is interstate. All shipments from Superior to Minnesota points move interstate. That the paramount authority of Congress may be exercised, the regulation of rates from these cities, whether interstate or intrastate, must be by national authority. Under the decisions in the Minnesota Rate cases, the Minnesota rate schedule to Duluth intrastate became effective. Higher rates having been paid pending the litigation, shippers intrastate received a refund of part of the rate paid by them, and in complaints before the Interstate Commerce Commission it was contended that the refunds paid on intrastate shipments should be adopted as the measure of refunds on interstate shipments. The Interstate Commerce Commission applied the paramount authority of the national government regarding the state, prescribed rates as a fact to be considered, but determined the question for itself.<sup>20</sup>

§ 7. **Eminent Domain.**—The right of eminent domain is an incident to sovereignty. The right has been defined as the power to compel an owner to sell and convey property when the public necessities require.<sup>21</sup> The right must, of course, be exercised within constitutional limits. The right may be exercised for a public purpose and upon payment of a proper compensation, after due process of law, against the right of way of an interstate carrier. It has been held by the Supreme Court of the United States<sup>22</sup> that the power of eminent domain was not surrendered by the states to the United States nor affected by the federal Constitution, except that it must be exercised in accordance with due process of law upon payment of compensation. The power of eminent domain extends

S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 38 L. R. A. (N. S.) 44.

20. Freight rates from Minnesota points, 32 I. C. C. 361. Rates on Beer and Other Malt Products, 31 I. C. C. 544. Compare Corp. Com. of Okla. v. A. T. & S. F. Ry. Co., 31 I. C. C. 532; Trier v. C. St. P. M. & S. Ry. Co., 30 I. C. C. 352. Holmes & Hallowell Co. vs. G. N. Ry. Co., 37 I. C. C. 627.

21. United States v. Jones, 109 U. S. 513, 27 L. Ed. 1015, 3 Sup. Ct. 346; Cincinnati v. Louisville & N. R. Co., 223 U. S. 390, 56 L. Ed. 481, 32 Sup. Ct. 267; Fletcher v. Peck, 6 Cranch, 10 U. S. 87, 3 L. Ed. 162.

22. Cincinnati v. Louisville & N. R. Co., 223 U. S. 390, 56 L. Ed. 481, 32 Sup. Ct. 267, and also see, Western Union Tel. Co. v. Penn-

to tangibles and intangibles, including choses in action, contracts and charters. An appropriation of a contract under the right of eminent domain, with compensation, neither challenges its validity nor impairs the obligation thereunder. It is a taking of property, not an impairment of an obligation. Every contract, whether between the state and an individual or between individuals only, is subject to the law of eminent domain, for there enters into every engagement the unwritten condition that it is subject to appropriation for public use.

Congress has made all railroads governmental post roads<sup>24</sup> and authorized telegraph companies, under certain conditions, to construct, maintain and operate lines thereover.<sup>25</sup> These acts alone gave no right to telegraph companies to acquire the use of the railroads' right of way, but a state statute giving such right against the right of way of an interstate carrier is not invalid as an attempted regulation of interstate commerce; it being the opinion of the Circuit Judges of the Sixth Circuit that "it was the intention of Congress to leave to the states the question of granting or withholding the right of eminent domain."<sup>26</sup> The right arising under a state law comes within that division of the state's powers which may be exercised in the absence of federal regulation.

Municipalities and states may not regulate or tax messages for the Federal government, nor deny telegraph companies which have accepted the terms of the Act of July 24, 1866 the right to continue the use of streets. Reasonable local regulations not in conflict with these principles and not a regulation of interstate commerce are permitted.<sup>27</sup>

sylvania R. R. Co. et al., 195 U. S. 540, 49 L. Ed. 312, 25 Sup. Ct. 133, 1 Ann. Cas. 517.

23. Acts June 15, 1866, c. 124, 14 Stat. 66 (Rev. Stat. Sec. 5258 U. S. Comp. Stat. 1901, p. 3565), and Acts June 8, 1872, c. 335, 17 Stat. 308, 209 (Rev. Stat. Sec. 3964, U. S. Comp. St. 1901, p. 2707); 5 Fed. Stat. Ann. 900.

24. Acts July 24, 1866, c. 230, 14 Stat. 221 (Rev. Stat. Secs. 5263-5269 (U. S. Comp. St. 1901, pp.

3579, 3580)). Cincinnati v. Louisville & N. R. Co., 223 U. S. 390, 56 L. Ed. 481, 32 Sup. Ct. 267, Western Union Tel. Co. v. Penn. R. Co., 195 U. S. 540, 49 L. Ed. 312, 25 Sup. Ct. 133, 1 Ann. Cas. 517.

25. Louisville & N. R. Co. v. Western Union Tel. Co., 207 Fed. 1, 124 C. C. A. 573.

26. See also Williams v. Talladega, 226 U. S. 404, 57 L. Ed. 275, 33 Sup. Ct. 116, holding that the

That the United States may exercise the power to condemn land "whenever it is necessary or appropriate \* \* \* in the execution of any of the powers granted \* \* \* by the Constitution,"<sup>27</sup> can not be doubted. Nor can the state "by action or inaction, prevent, unreasonably burden, discriminate against or directly regulate interstate commerce or the right to carry it on."<sup>28</sup> This quotation, read in the light of the case in which the language was used, is a declaration that a state, by refusing the right of eminent domain, can not prohibit interstate commerce.

§ 8. **States May Establish Means for Interstate Transportation.**—The states may grant corporate franchises, and the corporations so created, being authorized so to do by the law of their creation, may engage in interstate transportation. It is also true that a state may, as a general rule, exclude a corporation of another state from transacting ordinary business not interstate commerce, within its limits, or permit the engaging in such business on terms. The state creating a corporation does not confer thereon the right to engage in interstate commerce, nor can a state "exclude from its limits a corporation engaged in such commerce."<sup>29</sup> In *Oklahoma v. Kansas Natural Gas Co.*,<sup>30</sup> the Supreme Court of the United States held invalid a law of Oklahoma which prohibited a corporation of another state from engaging in the transportation of oil from Oklahoma in interstate commerce. The law was sought to be sustained upon the theory that it was made to "conserve" the natural resources of the state. In denying the validity of this contention the court argued that, if Oklahoma could exercise such power, other states might, and.

federal statute was merely permissive and citing cases. *Essex v. New England Tel. Co.* 239 U. S. 313, 60 L. Ed. 301, 36 Sup. Ct. 102.  
 27. *United States v. Gettysburg Elec. Ry.* 160 U. S. 668, 679, 40 L. Ed. 576, 16 Sup. Ct. 427; *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449; *Cherokee Nation v. Kansas Railway*, 135 U. S. 641, 656, 34 L. Ed. 295, 10 Sup. Ct. 965; *Chappell v. United States*, 160 U.

S. 499, 40 L. Ed. 510, 16 Sup. Ct. 397.

28. *Oklahoma, West, Attorney General v. Kansas Natural Gas Co.*, 221 U. S. 229, 262, 55 L. Ed. 716, 31 Sup. Ct. 564; affirming *Haskell v. Kansas Natural Gas Co.*, 172 Fed. 545.

29. See note 28 *supra*, 221 U. S. at p. 260 and cases cited throughout opinion.

said the court, "a complete annihilation of interstate commerce might result." Mr. Justice McKenna, at p. 261 of the opinion, quotes with approval these propositions:

"No state by the exercise of, or by the refusal to exercise, any or all of its powers, may prevent or unreasonably burden interstate commerce within its borders in any sound article thereof.

"No state by the exercise of, or by the refusal to exercise, any or all of its powers, may substantially discriminate against or directly regulate interstate commerce or the right to carry it on."

A corollary to this statement of the law is, "that a corporation of one state authorized by its charter to engage in lawful commerce among the states may not be prevented by another state from coming into its limits for all the legitimate purposes of such commerce."<sup>30</sup> This is true because the right to carry on interstate commerce is not a privilege granted by a state but is one of the privileges of every citizen of the United States, "and the accession of mere corporate facilities \* \* \* cannot have the effect of depriving them of such right."<sup>31</sup> A fortiori Congress might create or license a corporation to engage in commerce "among the states" and no state could prevent such corporation "from coming into its limits for all the legitimate purposes of such commerce."

Nonincorporation does not prevent the regulation of a common carrier.<sup>32</sup>

**§ 9. Regulation of Facilities—Depots.**—The Acts of Congress regulating interstate commerce apply to "common \* \* \* carriers engaged in the transportation of passengers or property \* \* \* by railroad."<sup>33</sup> "Railroad" includes

30. *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 27, 54 L. Ed. 355, 30 Sup. Ct. 190.

31. *Buck Stove Co. v. Vickers*, 226 U. S. 205, 215, 57 L. Ed. 189, 33 Sup. Ct. 41. See also, *Mercantile Trust Co. v. Tex. & P. Ry. Co.*, 216 Fed. 220—holding that a railroad company incorporated under an act of Congress can not

be excluded by a state from doing business within its borders.

32. *Platt v. Le Cocq*, 150 Fed. 391, reversed on another point, *Platt v. LeCocq*, 158 Fed. 723, 85 C. C. A. 621, 15 L. R. A. (N. S.), 558; *United States Express Co. v. State*, 164 Ind. 196, 73 N. E. 101.

33. Sec. 1 Act to regulate Commerce, *post*, Sec. 335.

“bridges, car floats, lighters and ferries \* \* \* and also all switches, spurs, tracks and terminal facilities of every kind used or necessary in the transportation of \* \* \* persons or property \* \* \* and also all freight depots.”<sup>34</sup> The act does not apply to “transportation of passengers or property \* \* \* wholly within one state.”<sup>35</sup>

A station for the accommodation of passengers and for the receipt and delivery of freight is necessary both for interstate and intrastate transportation, and generally such stations serve the needs of each class of transportation. It has been held that the provision limiting the scope of the Acts of Congress regulating interstate transportation applies to all portions of the act;<sup>36</sup> although the limiting proviso does not justify a state in discriminating against interstate commerce.<sup>37</sup>

From this it follows that there is a field in which the states may act in regulating carriers, although such carriers may be engaged in both interstate and intrastate transportation. The boundaries of the respective powers of the state and federal governments are not distinctly marked. It has been said that the Act of Congress, “excludes the right of a state to regulate \* \* \* the obligation of furnishing the means of interstate transportation.”<sup>38</sup>

In the *Larabee Mills* case<sup>39</sup> it was held that the mere grant by Congress of power to the Interstate Commerce Commission does not, in the absence of action by the Commission, change the rule that the states “may regulate many matters which indirectly affect interstate commerce.” There is, as said by Mr. Justice Hughes in the *Minnesota Rate Cases*,<sup>40</sup> an “interblending of operations in the conduct of interstate and local busi-

34. *Id.*, Sec. 337, *post*.

35. *Id.*, Sec. 336, *post*.

36. *Simpson et al., R. R. Com. of Minnesota v. Shepard*, 230 U. S. 352, 432, 433, 57 L. Ed. 1511, 33 Sup. Ct. 729.

37. *Houston & Texas Railway v. U. S.*, 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833.

38. *Demurrage Cases, Chicago R. I. & P. Co. v. Hardwick Farmers Elevator Co.*, 226 U. S. 426,

57 L. Ed. 284, 33 Sup. Ct. 174; *St. Louis I. M. & S. Ry. Co. v. Edwards*, 227 U. S. 265, 269, 270, 57 L. Ed. 506, 33 Sup. Ct. 26.

39. *Missouri Pac. Ry. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 623, 53 L. Ed. 352, 29 Sup. Ct. Rep. 214, affirming *Larabee Flour Mills Co. v. Missouri Pac. Ry.*, 74 Kan. 808, 88 Pac. 72.

40. Note 36, *supra*.

ness by interstate carriers. \* \* \* The same right-of-way, terminals, rails, bridges, are provided for both classes of traffic; \* \* \* the proportion of each sort of business varies from year to year and, indeed, from day to day; \* \* \* no division of the plant, no apportionment of it between interstate and local traffic, can be made today which will hold tomorrow; \* \* \* terminals, facilities and connections in one state aid the carrier's entire business and are an element of value with respect to the whole property and the business in other states." But notwithstanding this is true, Congress has not occupied the whole field and the states may act so as indirectly to affect interstate transportation where, "congressional action leaves room without a conflict for the operation of the state law in the same field." "

A statute in Mississippi required railroads to "establish and maintain such depots as shall be reasonably necessary for the public convenience," and to "stop such of the passenger and freight trains at any depot as the business and public convenience shall require." The Railroad Commission of Mississippi having ordered a carrier to stop an interstate train at a particular depot, Mr. Justice Peckham delivering the opinion of the court, after citing cases, said: "Upon the principle decided in these cases, a state railroad commission has the right, under a state statute, so far as railroads are concerned, to compel a company to stop its train under the circumstances already referred to, and it may order the stoppage of such trains if the company does not otherwise furnish proper and adequate accommodation to a particular locality, and in such cases the order may embrace a through interstate train actually running and compel it to stop at a locality named. In such case, in the absence of congressional legislation covering the subject, there is no illegal or improper interference with the interstate commerce right." The order, however, was held invalid as unreasonable.

A carrier may not be compelled by mandamus to build a station at a particular place in the absence of a specific statu-

41. *Louisville & N. R. Co. v. Hughes*, 201 Fed. 727, 742. 344, 51 L. Ed. 209, 27 Sup. Ct. Rep. 90, affirming *Illinois C. R.*

42. *Mississippi R. R. Com. v. Illinois C. R. Co.*, 203 U. S. 335, 133 Fed. 327, 70 C. C. A. 617. *Co. v. Mississippi R. R. Com.*

tory duty so to do," but when the statute so authorizes, mandamus will lie to compel the construction of a depot." It may be said that the proper governmental authority, whether legislative or administrative, the latter being by statute authorized, may regulate the location and require the construction of depots and the maintenance of necessary depot facilities. Such regulation must in all cases be reasonable and must be made upon proper consideration of the rights of both the carriers and the public. Whether such regulation can be enforced by mandamus or by suits for penalties depends upon the terms of the particular regulating statute. The Interstate Commerce Commission has exercised the right to regulate the use of freight terminals," and such regulation is within its statutory power. It would seem that regulations as to the construction, location, operation and maintenance of depots, being regulations which can best be made by a local tribunal, are at least in the present state of the federal law and in view of non-action by the Interstate Commerce Commission, within the cognizance of state laws and state

43. Northern Pac. R. Co. v. Washington Territory, 142 U. S. 452, 35 L. Ed. 1092, 12 Sup. Ct. 283, but see the vigorous dissent of Mr. Justice Brewer concurred in by Justice Field and Harlan. The majority opinion is sustained by a well-reasoned argument quoted from *People v. N. Y. L. E. & W. R.*, 104 N. Y. 58, 9 N. E. 856, although there is authority supporting the dissenting view, *Concord & M. R. Co. v. Boston & M. R. Co.*, 68 N. H. 464, 41 Atl. 263.

44. *People v. Delaware & H. Canal Co.*, 32 N. Y. App. Div. 120, 52 N. Y. Supp. 850, affirmed in 165 N. Y. 362, 59 N. E. 138; *Central of Georgia Ry. Co. v. State*, 104 Ga. 831, 31 S. E. 531; *Railroad Commissioners of South Carolina v. Columbia & G. R. Co.*, 26 S. C. 353, 2 S. E. 127; *Northern Pac. R. Co. v. Territory (Wash.*

*T.)*, 13 Pac. 604; *McCoy v. Cincinnati I. St. L. & C. R. Co.*, 13 Fed. 3; *State v. Republican Val. R. Co. (Neb.)*, 26 N. W. 205 and 24 N. W. 329. The right of a commission to locate a station does not authorize a requirement that separate freight and passenger depots be maintained. *State v. Yazoo Valley R. Co.*, 87 Miss. 679, 40 So. 262.

45. *Federal Sugar Refining Co. v. Baltimore & O. R. Co.*, 17 I. C. C. 40, 47, 20 I. C. C. 200; *Cattle Raisers' Asso. v. C. B. & Q. R. Co.*, 11 I. C. C. 277; *R. R. Com. of Ky. v. L. & N. R. R. Co.*, 192 U. S. 568, 48 L. Ed. 565, 24 Sup. Ct. 339.

In *United States v. B. & O. R. Co.*, 231 U. S. 274, 58 L. Ed. 218, 34 Sup. Ct. 75, the order of the Commission was set aside but the right to regulate conceded.

commissions." Such regulation does not burden or impede, but aids and facilitates intercourse and traffic."

It is not an unconstitutional interference with interstate commerce for a State statute to prohibit any change in location of shops, roundhouses and general offices of a railway company which had located and agreed to maintain them for a valuable consideration."

Under these principles, a railroad may be compelled to install a telephone in a depot to facilitate its business" but not for general commercial purposes."

The business of a railroad is transportation, and it cannot be compelled to provide scales at local stations for the convenience of stock shippers."

§ 10. **Regulation of Facilities—Terminal Roads.**—Short lines of railroad engaged as common carriers in the business of transporting freight between the termini of other common

46. Cases illustrating the exercise of the power by state authority are: *Atty. Gen. of Mass. v. Eastern R. Co.*, 137 Mass. 45; *Board of R. R. Com'rs of Kansas v. Missouri P. R. Co.*, 71 Kan. 193, 80 Pac. 53; *Corporation Commission of N. C. v. Seaboard A. L. Ry.*, 161 N. C. 270, 76 S. E. 554; *St. Louis I. M. & S. Ry. Co. v. State*, 31 Okla. 509, 122 Pac. 217; *Horton v. So. Ry. Co.*, 173 Ala. 231, 55 So. 531; *College Arms Hotel Co. v. Atlantic C. L. R. Co.*, 61 Fla. 553, 54 So. 459; *St. Louis S. W. Ry. Co. v. State*, 97 Ark. 473, 134 S. W. 970; *State v. Ogden Rapid Transit Co.*, 38 Utah 242, 112 Pac. 120; *Pecos & N. T. Ry. Co. v. Railroad Com. of Texas*, 56 Tex. C. A. 422, 120 S. W. 1055; *R. R. Com. of Tex. v. Chicago, R. I. & G. Ry. Co.*, 114 S. W. 192, reversed 102 Tex. 393. 117 S. W. 794; *Louisiana R. & N. Co. v. R. R. Com. of La.*, 121 La. 849, 49 So. 884.

47. *Morris-Scarboro-Moffitt Co. v. Southern Express Co.*, 146 N. C. 167, 59 S. E. 667; *Pittsburg C. C. & St. L. R. Co. v. Hunt*, 171 Ind. 189, 86 N. E. 328.

48. *International & G. N. R. Co. v. Anderson Co.*, 246 U. S. 424, 62 L. Ed. 807, 38 Sup. Ct. 370. But "the court will never order a railroad station to be built or maintained contrary to the public interest"; *Northern Pacific R. Co. v. Washington*, 142 U. S. 492, 35 L. Ed. 1092, 12 Sup. Ct. 293 and see *Armour & Co. v. Texas & Pacific Ry. Co.* 258 Fed. 185, — C. C. A. —.

49. *Atchison T. & S. F. Ry. Co. v. State*, 23 Okla. 210, 100 Pac. 11.

50. *Atchison T. & S. F. Ry. Co. v. State*, 23 Okla. 231, 100 Pac. 16. See as to right to require rates to be posted, *Johnson v. Seaboard A. L. Ry.*, 78 S. C. 361, 52 S. E. 644.

51. *New Mex. Wool Growers' Asso. v. A. T. & S. F. R. Co.*, N. M., 145 Pac. 1077; *G. N. R. Co. v.*

carriers and industries not directly on the lines of the principal carriers are designated as terminal railroads. Generally this terminal railroad is located in only one state and is a state corporation. It delivers freight which may be brought to it by other carriers or delivers freight from industries to other carriers, such freight being destined from or to points both within and without the state in which the terminal railroad is located.

In a federal case decided in 1887 it was held that a "switching" service was local and might be regulated by a state commission,<sup>52</sup> but it cannot now be doubted that, where a delivery service by a terminal road relates to freight which moves in interstate commerce, as to such transportation the carrier is not legally subject to any regulation by state authority. The Interstate Commerce Commission has regulated rates of terminal charges, holding that, "A state statute fixing terminal charges is not controlling with respect to interstate transportation."<sup>53</sup> Discrimination by a terminal company was prohibited.<sup>54</sup> Through routes and joint rates with terminal roads have been ordered.<sup>55</sup> That such roads, as to interstate transportation of which the terminal haul is a part, are within the Act to Regulate Commerce has been recognized and established by the Supreme Court of the United States.<sup>56</sup> In the *Southern Pacific Terminal* case,<sup>57</sup> Mr. Justice McKenna quotes approvingly language of the Commission aptly express-

Minnesota, 238 U. S. 340, 59 L. Ed. 1337, 35 Sup. Ct. 753.

52. *Chicago M. & St. P. Ry. Co. v. Becker*, 32 Fed. 849; the rate prescribed by the State Commission was enjoined as being too low, same case 35 Fed. 883.

53. *Wilson Produce Co. v. Penna. R. Co.*, 14 I. C. C. 170.

54. *Eichenberg v. So. Pac. Co.*, 14 I. C. C. 250; order approved, *So. Pac. Terminal Co. v. Int. Com. Com.*, 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279.

55. *Mfgs. Ry. Co. v. St. Louis I. M. & S. Ry. Co.*, 21 I. C. C. 304;

and see *Peale v. Cent. R. Co. of N. J.*, 18 I. C. C. 25, and cases cited, at p 33.

56. *Int. Com. Com. v. Chicago B. & Q. R. Co.*, 186 U. S. 320, 46 L. Ed. 1182, 22 Sup. Ct. 824; *So. Ry. Co. v. St. L. Hay & G. Co.*, 214 U. S. 297, 53 L. Ed. 1004, 29 Sup. Ct. 678; *Int. Com. Com. v. Stickney*, 215 U. S. 98, 54 L. Ed. 112, 30 Sup. Ct. 66; *United States v. Union Stock Yards & Transit Co.*, 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83. *Railroad Com. of Ga. v. L. & N. R. Co.*, 148 Ga. 442, 445.

57. Note 54, *supra*.

ing the rule. He there quoted: "The Terminal Company is part and parcel of the system engaged in the transportation of commerce, and to the extent that such commerce is interstate the Commission has jurisdiction to supervise and control it within statutory limits. To hold otherwise would in effect permit carriers generally, through the organization of separate corporations, to exempt all of their terminals from our regulating authority."

Terminal roads, therefore, as to all questions of rates and regulations, are subject to the jurisdiction of the state or the federal government in the same way as other common carriers. When the regulation relates to intrastate transportation and does not affect interstate commerce, a state commission may act, otherwise the Interstate Commerce Commission alone has power to prescribe rates, rules and regulations.

§ 11. **State Laws Forbidding the Consolidation of Competing Carriers.**—A constitutional provision of the state of Kentucky prohibiting the consolidation of stocks, franchises or property, as well as the purchase and lease, of parallel or competing lines of railroad does not so interfere with interstate commerce as to be invalid. The "instruments of commerce" may be regulated by the states. In sustaining the foregoing law of Kentucky, Mr. Justice Brown, announcing the opinion of the Supreme Court, said:\*

"The power to construct them (railroads) involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserved to itself the superior right to control their commerce and forbid interference therewith; while to the states remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests.

58. *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. Ed. 849, 16 Sup. Ct. 714. Explained, *Northern Securities Co. v. United States*, 193 U. S. 197, 348, 48 L. Ed. 679, 705, 24 Sup. Ct. 436, Pearsall

*v. Great Northern R. Co.*, 161 U. S. 646, 40 L. Ed. 838, 16 Sup. Ct. 705. *Simpson, et al., R. R. Com. of Minnesota v. Shepard*, 230 U. S. 352, 432, 433, 57 L. Ed. 1511, 33 Sup. Ct. 729.

"If it be assumed that the states have no right to forbid the consolidation of competing lines, because the whole subject is within the control of Congress, it would necessarily follow that Congress would have the power to authorize such consolidation in defiance of state legislation—a proposition which needs only to be stated to demonstrate its unsoundness."

The concluding language of Mr. Justice Brown has a significant application to the provisions of section 407 of the Transportation Act 1920, which section amends section 5 of the Interstate Commerce Act. The paragraphs added by the amendment authorize the consolidation of the properties of two or more railroads. Practically all the railroads subject to these enactments were incorporated under State laws, they are creatures of the States; but are instrumentalities of interstate commerce. The constitutionality of this provision of the amendment is discussed Section 63a, post.

§ 12. **Regulation of Facilities—Spur Tracks.**—Where an order of a state tribunal affects only intrastate commerce, the question of whether or not it was arbitrary and unreasonable is for the state courts, and it is proper to require a carrier to furnish facilities for making the necessary connections for passenger travel; even if, in doing so, that service must be furnished at a loss."

A state statute authorizing a state commission to require a railroad to permit the erection of an elevator upon its road bed was held by the Supreme Court of the United States to be invalid;<sup>59</sup> and the same court held void a law compelling all railroads upon application and when a specified elevator capacity exists, to "erect, equip and maintain a side track or switch of suitable length to approach as near as four feet of the outer edge of their right of way when necessary, and in all cases to approach as near as necessary to approach an elevator that may be erected by the applicant or applicants adjacent to their right of way for the purpose of loading

59. *Atlantic C. L. R. Co. v. North Carolina Corp. Com.*, 206 U. S. 1, 51 L. Ed. 933, 27 Sup. Ct. 585, affirming *North Carolina Corp. Com. v. Atlantic C. L. R. Co.*, 137 N. C. 1, 49 S. E. 191, 115 Am. St. Rep. 636.

60. *Missouri Pac. Ry. Co. v. Nebraska*, 164 U. S. 403, 41 L. Ed. 489, 17 Sup. Ct. 130.

grain into cars from said elevator, and for handling and shipping grain to all persons or associations so erecting or operating such elevators, or handling and shipping grain, without favoritism or discrimination in any respect whatever." One of the contentions made in the argument against the validity of this law was that it conflicted with the commerce clause of the Constitution of the United States. This contention was not determined, as the law was held invalid because it failed to provide indemnity to the carrier."

A regulation requiring a carrier to deliver cars beyond its tracks to a private switch is illegal." In *McNeill v. Southern Ry. Co.* cited note, *supra*, the North Carolina Corporation Commission entered an order requiring the railway company, upon payment of freight charges, to make delivery of the cars beyond its right of way on the siding of a private coal company. The order was held invalid as "amounting to an unlawful interference with interstate commerce."

That a spur track ordered by a state commission may be for the present benefit of only one industry, does not make the condemnation of property necessary for the construction of the spur track the taking of property for a private purpose." A state has no power to compel a carrier to switch cars from a connection with a competing road to a designated side track within its own terminals for the purpose of being laden with freight for immediate transportation." If the transportation is intrastate, different carriers may be compelled by state authority to interchange freight."

The Supreme Court has not always given consideration to the fact that spur tracks serve both interstate commerce and

61. *Missouri Pac. Ry. Co. v. Nebraska*, 217 U. S. 196, 54 L. Ed. 727, 30 Sup. Ct. 461.

62. *Central Stock Yards Co. v. Louisville & N. R. Co.*, 118 Fed. 113, 55 C. C. A. 63, 63 L. R. A. 213; *McNeill v. So. Ry. Co.*, 202 U. S. 543, 50 L. Ed. 1142, 26 Sup. Ct. 722.

63. *Union Lime Co. v. Chicago & N. W. Ry. Co.*, 233 U. S. 211,

58 L. Ed. 924, 34 Sup. Ct. 522. Judge Gilbert of the Supreme Court of Georgia cites and follows the text, *Railroad Com. of Ga. v. L. & N. R. Co.* 148 Ga. 442, 445.

64. *Ill. C. R. Co. v. Railroad Com. of La.*, 236 U. S. 157, 59 L. Ed. 517, 35 Sup. Ct. 275.

65. *Mich. C. R. Co. v. Mich. R. Co.*, 236 U. S. 515, 59 L. Ed. 750, 35 Sup. Ct. 423.

intrastate commerce. The same statement applies to the cases relating to physical connections discussed in the succeeding sections. The principle applied in cases like the *McNeill Case*, *supra*, seems to be overlooked in other cases.

The Congress has regulated spur tracks and the interstate Commerce Commission has frequently entered orders authorized by such regulations." The field having been occupied by Congress, it would seem under well established rules, that the power of the states to regulate such tracks presently or intended to be used to serve interstate shipments, was excluded. The decisions of the Supreme Court do not in terms deny the existence or the application of the principle, they do in some cases ignore the principle. That Court properly holds that an enforced discharge by a common carrier of its duty to provide reasonably adequate extensions of a sidetrack leading to an adjacent manufacturing plant is not in violation of the Fourteenth Amendment to the Constitution, but the Court there ignored, if the question was raised, the really important issue of the competency of a State Commission to enforce such duty. It is practically universally true that such tracks must serve interstate commerce." In holding that the Georgia Commission was authorized to require a connecting track between two railroads, no reference was made to the issue of interference with interstate commerce, which, as the present writer, who was of counsel, knows, was distinctly raised by the testimony and which was the substantial question presented on brief and in oral argument." The Supreme Court of Virginia holds that although a side or spur track may be used for interstate commerce, as well as for intrastate commerce, the Corporation commission of that State has jurisdiction to compel its construction." This decision is in accord with judgments of the Supreme Court of the United States, but the Supreme Court has never defi-

66. Louisville Board of Trade v. L. & N. R. Co., 40 I. C. C. 679 and cases cited pp. 688, 689.

67. Chicago & N. W. R. Co. v. Ochs, — U. S. —, 63 L. Ed. —, 39 Sup. Ct. —.

68. Seaboard A. L. R. Co. v. R. R. Com. of Ga. 240 U. S. 324, 60 L. Ed. 669, 36 Sup. Ct. 260.

69. Washington & O. D. R. Co. v. Royster Guano Co., 122 Va. 397, 94 S. E. 763.

nately stated the principle and has in some of the cases cited above applied an opposing principle.

A double track may be required where the facts so justify." It may be accepted as law under the authorities as they now stand that where there is a "full hearing" and a reasonable justification for the order, a State Commission has jurisdiction to compel a common carrier to construct and maintain a spur track to a private plant, when such track furnishes additional trackage for a public use, even though interstate commerce as well as intrastate commerce is served thereby. This statement, although supported by the highest authority, is of doubtful soundness as thereby states are given concurrent jurisdiction over matters constitutionally committed by the Congress to the Interstate Commerce Commission, and over which that Commission has frequently exercised jurisdiction."

The Transportation Act 1920 enlarges the powers of the commission, giving it authority to require the joint use of terminals." With these enlarged powers the Supreme Court may apply correct principles and hold that the states may no longer regulate terminals, spurs, tracks and connections.

The decision of the Circuit Court of Appeals for the Eighth Circuit that an interplant switching service may be performed by an interstate carrier for a consideration of the lease of land<sup>70</sup> seems contrary to a sound rule of law and policy.<sup>71</sup> The Supreme Court in *Penn. R. Co. v. Public Serv. Com. of Penn.*, — U. S. —, 64 L. Ed. —, 40 Sup. Ct. —, correctly says that "States no more can supplement its (Federal) requirements than they can annul them."

**§ 13. Requiring Physical Connections between Carriers.**— In the *Jacobson case*,<sup>72</sup> under authority of a law of Minne-

70. *Phoenix Ry. Co. v. Geary*, 239 U. S. 277, 60 L. Ed. 287, 36 Sup. Ct. 45.

71. See notes 66 and 67, *supra*.

72. Sec. 344f *Post*.

73. *Am. Smelting & Ref. Co. v. Union Pac. R. Co.* — C. C. A. —, 256 Fed. 737.

74. *post* Sec. 182. *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. Ed. 297, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671, *Chicago I. & L. R. Co. v. U. S.* 219 U. S. 486, 55 L. Ed. 305, 31 Sup. Ct. 272, affirming 163 Fed. 114.

75. *Wisconsin M. & P. R. Co. v.*

sota, the State Railroad Commission ordered a connection between two common carriers of the state, and this order the courts enforced. The carriers contended that the order was void as an unreasonable regulation of commerce, and that in requiring the construction of the connecting track, the order and judgment took property without due process of law. In the brief the contention was made that the law upon which the proceedings were had was "an ill-disguised attempt to control and regulate interstate traffic." The court did not construe the order as directly affecting interstate commerce and overruled the other contentions of the plaintiff in error. The opinion concludes as follows:

"In this case the provision is a manifestly reasonable one, tending directly to the accommodation of the public, and in a manner not substantially or unreasonably detrimental to the ultimate interests of the corporation itself.

"Although to carry out the judgment may require the exercise by the plaintiff in error of the power of eminent domain, and will also result in some, comparatively speaking, small expense, yet neither fact furnishes an answer to the application of defendant in error."

The Jacobson case differs from the McNeill case, Sec. 12, *supra*, in that in the McNeill case there was an order to connect with a private plant, while in the Jacobson case two state common carriers were directed to make a physical connection. In the Jacobson case, the Supreme Court said *arguendo* that the order for the connection there did not affect interstate commerce, and Mr. Justice Peckham, for the court, said:

"But the Supreme Court of the state, in the opinion delivered therein said that there was ample evidence in the case of a necessity for such track connection resulting from the benefit which would accrue to exclusively state commerce, when considered alone, to justify the ordering of the connection in question."

In the Jacobson case the regulation only incidentally affected interstate commerce; in the McNeill case the regulation had direct reference to interstate commerce. In discussing the McNeill case, Mr. Justice White said:

“The cars of coal not having been delivered to the consignee, but remaining on the tracks of the railway company in the condition in which they had been originally brought into North Carolina from points outside of that state, it follows that the interstate transportation of the property had not been completed when the corporation commission made the order complained of.”

These facts clearly differentiate the two cases, and make the respective opinions harmonious.

The more recent case of the *Larabee Mills*<sup>76</sup> is interesting and instructive. In that case the Supreme Court of Kansas compelled, by mandamus, the Missouri Pacific Railway Company to deliver cars from another road over existing transfer tracks to the mill of the Larabee Mills, that the mill might be enabled to ship out its manufactured product, three-fifths of which went to points outside the state of Kansas. It appeared that the railway company accorded similar privileges to other flour mills along its right of way. In the Supreme Court of the United States the railroad relied strongly on the *McNeill* case. The two cases are much alike. In the *McNeill* case the delivery of loaded cars was sought over a private track to a coal yard; who built the track is not disclosed. In the *Larabee Mills* case the delivery of empty cars was sought over a track, the ownership of which is not disclosed, but which was essentially for the private use of the mill. In the *McNeill* case it appears that the coal cars were brought from another state, although it must have been true that at times the spur track was used in intrastate transportation; in the *Larabee Mills* case there was both interstate and intrastate transportation from the mill. Thus far there seems to be no legal distinction between the two cases. There is, however, one clear distinction. The order in the *Larabee Mills* case was made to prevent discrimination; such fact does not appear in the *McNeill* case. In the *Larabee Mills* case it was contended by the railroad “that no duty was imposed on the railroad company by act of the legislature or mandate of commission or other administrative board.” To this argument Mr. Justice Brewer answered:

76. *Missouri Pac. R. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 53 L. Ed. 352, 29 Sup. Ct. 214.

"No legislative enactment, no special mandate from any commission or other administrative board was necessary, for the duty arose from the fact that it was a common carrier. This lies at the foundation of the law of common carriers. Whenever one engages in that business the obligation of equal service to all arises, and that obligation, irrespective of legislative action or special mandate, can be enforced by the courts. \* \* \* All these questions are disposed of by one well-established proposition, and that is, that a party engaging in the business of a common carrier is bound to treat all shippers alike and can be compelled to do so by mandamus or other proper writ."

What, then, the Supreme Court of Kansas did was to enforce the common-law duty of the carrier to treat all shippers alike. This it had the right to do prior to action by Congress or the Commission appointed by Congress, even though in doing so interstate commerce might be affected. This principle Mr. Justice Brewer states:

"This case does not rest upon any distinction between interstate commerce and that wholly within the state. It is the contention of counsel for the mill company that it comes within the oft-repeated rule that the state, in the absence of express action by Congress, may regulate many matters which indirectly affect interstate commerce, but which are for the comfort and convenience of its citizens. Of the existence of such a rule there can be no question. It is settled and illustrated in many cases. \* \* \* The mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens."

In discussing the McNeill case, Mr. Justice Brewer said:

"There are many points of resemblance between that case and this, but there is this substantial distinction: In that was presented and determined solely the power of a state commission to make orders respecting the delivery of cars engaged in interstate commerce beyond the right of way of the carrier and to a private siding—an order which affected the movement of the cars prior to the completion of the

transportation, while here is presented, as hereinbefore indicated, the question of the power of the state to prevent discrimination between shippers, and the common-law duty resting upon a carrier was enforced. This common-law duty, the state, in a case like the present, may, at least in the absence of congressional action, compel a carrier to discharge."

Mr. Justice Moody dissented, placing his dissent on the McNeill case, between which and the instant case he saw no legal distinction.

These cases were determined prior to the passage of the Hepburn Act," which act extended the power of the Interstate Commerce Commission.

Since the passage of that act, the Supreme Court has held void a state regulation requiring a physical connection between common carriers of the state of Washington." In this, the Fairchild case, the order to make the connection was held void, the reason for so holding being stated by Mr. Justice Lamar as follows:

"There is nothing by which to compare the advantage to the public with the expense to the defendant and nothing to show that within the meaning of the law there is such public necessity as to justify an order taking property from the company."

The effect of the order on interstate commerce was not discussed, nor was that question raised, it seemingly being assumed that the order related to intrastate commerce.

It appears from the authorities and in view of the enlarged powers of the federal commission under the Acts of 1906 and 1910, that a physical connection could not be ordered by authority of the states when the purpose of the connection was wholly or partly to accommodate interstate commerce."

77. Act June 29, 1906, 34 Stat. L. 584, c. 3591, U. S. Comp. St. Supp. 1907, p. 892, Fed. Stat. Ann. Supp. 1907, p. 168, Secs. 338, 400.

78. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. Ed. 863, 32 Sup. Ct. 535.

79. So. Ry. Co. v. Reid, 222 U. S. 424, 56 L. Ed. 257, 32 Sup. Ct. 140; United States v. Union Stock

Yard & Transit Co., 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83; New York C. & H. R. Co. v. Hudson County, 227 U. S. 248, 57 L. Ed. 499, 33 Sup. Ct. 269; Seaboard A. L. Ry. Co. v. R. R. Co. of Georgia, 206 Fed. 181; see also Atlantic S. R. & G. Ry. Co. v. State, 42 Fla. 358, 29 So. 319, 89 Am. St. Rep. 233. At common law

It has, however, been held, and upon what appears to be sound reasoning based upon authority, that such connections may be required when made to accommodate intrastate commerce, the requirement being one for a facility for transportation and in no way burdening interstate commerce." The use of terminal facilities could not prior to Transportation Act 1920 be taken from one carrier for the benefit of another." This does not mean that one road could not in a proper case be required to switch the cars of another and connecting carrier."

Transportation Act 1920 authorizes the Commission to require that terminals be opened to a joint use."

**§ 14. Delivery over Connecting Tracks.**—Railroads are organized for a public purpose and to serve primarily the public

individuals could not force the right to connect private tracks, *People v. Chicago & N. W. Ry.*, 57 Ill. 436; *State v. Willmar & S. F. Ry. Co.*, 88 Minn. 448, 93 N. W. 112. No objection that connection is with main line. *Morris Draying Co. v. Greenville & H. Ry. Co.*, 62 N. J. Eq. 768, 48 Atl. 568, affirming 59 N. J. Eq. 372, 46 Atl. 638. Law may apply to contiguous roads which do not cross, *New York L. & W. Ry. Co. v. Erie R. Co.*, 31 App. Div. 378, 52 N. Y. Supp. 318. appeal dismissed 157 N. Y. 674, 51 N. E. 1092; *Gallagher v. Keating*, 28 Misc. Rep. 131, 58 N. Y. Supp. 366. Statute authorizing plant tracks to connect valid, *Reeser v. Philadelphia & R. Ry. Co.*, 215 Pa. 136, 64 Atl. 376. May require connections though roads do not cross at grade, *International & G. N. R. Co. v. R. R. Com. of Texas*, 99 Tex. 332, 89 S. W. 961, affirming 86 S. W. 16, — Tex. Civ. App. —; *Jacobson v. Wisconsin, M. & P. R. Co.*, 71 Minn. 519, 74 N. W. 893, 40 L. R. A. 389, 70 Am. St. Rep. 358. A rail-

road company is not compelled to switch freight which was not consigned over its lines from the line of one railroad to that of another in the same city, *Texas & N. O. Ry. Co. v. Gulf & I Ry. Co. of Texas*, 54 S. W. 1031, affirmed. *Gulf & I. Ry. Co. v. Texas & N. O. Ry. Co.*, 56 S. W. 328, 93 Tex. 482.

80. *Pittsburg, C. C. & St. L. Ry. Co. v. Hunt*, 171 Ind. 189, 86 N. E. 328; *State v. Florida E. C. Ry. Co.*, 58 Fla. 524, 50 So. 425; *Chicago, I. & L. Ry. Co. v. R. R. Com. of Indiana*, 175 Ind. 630, 95 N. E. 364.

81. *Louisville & N. R. Co. v. Central Stock Yards*, 212 U. S. 132, 53 L. Ed. 441, 29 Sup. Ct. 246, reversing same styled case, 133 Ky. 148, 97 S. W. 773; *Commonwealth v. Norfolk & W. Ry. Co.*, 111 Va. 59, 68 S. E. 351.

82. *Penna. Co. v. U. S.* 266 U. S. 351, 59 L. Ed. 616, 35 Sup. Ct. 370.

83. Note 72, *supra*; see also Sec. 12 *supra*.

good and convenience. The Interstate Commerce Commission has power to require physical connections between interstate carriers, and like power exists in the states so far as the requirements of intrastate commerce may reasonably demand.

That these connections may serve the public demands and needs, it is necessary that they be used. How far then may a carrier be compelled to receive and deliver cars over these connections when established?

There is a commerce which is intrastate and a commerce which is interstate. Each may be served by these connections, and both state and federal authorities may act for the purpose of requiring adequate service for the transportation within their respective jurisdictions. Neither the state government nor the federal government may require the establishment of facilities for transportation which are not within its proper sphere. This situation makes carriers subject to independent regulation from separate tribunals and it sometimes is a difficult question to determine which tribunal may require a particular facility, the facility required by either being usually for the benefit of the commerce of both.

While this duplication of control over carriers is frequently burdensome, until Congress acts, the courts must adjust the conflicting regulations as best they may. Applying these principles it can not be doubted that the states may, in proper cases, require carriers of intrastate commerce to receive and deliver cars from and to other carriers over the connections. This service must be necessary and must be reasonably compensated for, and provision must exist for the protection of the carrier in its compensation and for the return of its cars.<sup>84</sup>

84. *Central Stock Yards v. Louisville & N. R. Co.*, 192 U. S. 568, 48 L. Ed. 565, 24 Sup. Ct. 339, affirming *Central Stock Yards Co. v. Louisville & N. R. Co.*, 118 Fed. 113, 55 C. C. A. 63, 63 L. R. A. 213; *Louisville & N. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 53 L. Ed. 441, 29 Sup. Ct. 246, reversing *Louisville & N. R. Co. v. Central Stock Yards Co.*,

133 Ky. 148, 97 N. W. 778; *So. Ry. Co. v. St. Louis Hay & Grain Co.*, 214 U. S. 297, 53 L. Ed. 1004, 29 Sup. Ct. 678, reversing *So. Ry. Co. v. St. Louis Hay & Grain Co.*, 153 Fed. 728, 82 C. C. A. 614. Indemnity may be required of an irresponsible carrier, *Enterprise Transportation Co. v. Pennsylvania R. Co.* 12 I. C. C. 326; *Wisconsin, M. & P. R. Co.*

That a carrier may be compelled to transport freight over the connection between the terminus of another line to a team track or other siding on its own line, was determined by the Supreme Court in *Grand Trunk Railway Co. v. Michigan Railroad Commission*." In this case discrimination was alleged before the Commission, which made an order requiring that the discrimination be removed and that a new tariff be filed and made effective granting "like charges for the movement of a carload shipment received from an industry in the city of Detroit, upon said Grand Trunk Western Railway, consigned for delivery upon a team track or other siding of said road, within the same city, and for a like shipment received by said Grand Trunk Western Railway from a connecting carrier at a junction point within the corporate limits of the city of Detroit, consigned to a team track or other siding upon said road within the same city."

The carrier filed a tariff which the Commission suspended and an injunction was sought. The question arising in the suit was stated by the Supreme Court as follows:

"The question in the case is whether, under the statutes of the state of Michigan, appellants can be compelled to use the tracks it owns and operates in the city of Detroit for the interchange of intrastate traffic; or, stating the question more specifically, whether the companies shall receive cars from another carrier at a junction point or physical connec-

*v. Jacobson*, 179 U. S. 287, 45 L. Ed. 194, 21 Sup. Ct. 115, affirming *Jacobson v. Wisconsin, M. & P. R. Co.*, 71 Minn. 519, 74 N. W. 893, 40 L. R. A. 389, 70 Am. St. Rep. 358; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 900, affirming *State v. Minneapolis & St. L. R. Co.*, 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514; *Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 56 L. Ed. 863, 32 Sup. Ct. 535, reversing *State ex rel. Oregon R. & N.*

*Co. v. R. R. Com. of Washington*, 52 Wash. 17, 100 Pac. 179.

85. *Grand Trunk Ry. Co. v. Michigan R. Com.* 231 U. S. 451, 58 L. Ed. 310, 34 Sup. Ct. 152, affirming same styled case, 198 Fed. 1009. To same effect see *Chicago, I. & L. Ry. Co. v. R. R. Com. of Indiana*, 175 Ind. 630, 95 N. E. 364; *Thompson v. Missouri, K. & T. Ry. Co.*, 105 Tex. 372, 126 S. W. 257, on rehearing 128 S. W. 109, 2 Ann. Rep. Ind. Pub. Ser. Com. 107 *et seq.*, *Seaboard A. L. Ry. Co. v. R. R. Com. of Ga.*, 206 Fed. 181, 213 Fed. 27.

tion with such carrier within the corporate limits of Detroit for transportation to the team tracks of the companies; and whether the companies shall allow the use of their team tracks for cars to be hauled from their team tracks to a junction point or physical connection with another carrier within such limits and be required to haul such cars in either of the above-named movements or between industrial sidings."

The question thus stated was resolved in favor of the validity of the order of the state commission, although throughout the opinion emphasis is laid upon the fact of "the exceptional situation of Detroit" where the service required by the order covered an area of twenty-two miles.

To the contention that the last order suspending the tariff, which was the order involved, interfered with interstate commerce, the court said, "the contention is premature, it not without foundation." The question as stated related to intrastate commerce, and the answer must be similarly limited. The Jacobson case, cited note *supra*, was relied on, and the second of the Stock Yards cases, cited note *supra*, was distinguished. Had the order of the Michigan Commission required the transportation or delivery of commodities moving to or from another state, it would have been a direct attempt to regulate interstate commerce, and void under the decisions in the cases of *McNeill v. Southern Ry. Co.*" and *Ill. C. R. Co. v. Railroad Commission of Louisiana*. The Michigan case referred to a transportation service to be performed by the carrier for a fixed compensation and does not answer the quære in the *Riverside Mills* case" as to whether or not "a carrier can be compelled to accept goods for transportation beyond its own lines or be required to make a through or joint rate over independent lines." The Supreme Court of

86. *McNeill v. So. Ry.*, 202 U. S. 543, 50 L. Ed. 1142, 26 Sup. Ct. 722, modifying *So. Ry. Co. v. Greensboro Ice & Coal Co.*, 134 Fed. 82. See Sec. 13 *supra*, Ill. Cent. R. Co. v. Railroad Com. or

La. 236 U. S. 157, 59 L. Ed. 517, 35 Sup. Ct. 275.

87. *Atlantic C. L. R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. Ed. 167, 31 Sup. Ct. 164, 31 L. R. A. (N. S.) 7, affirming *Riverside Mills v. Atlantic C. L. R. Co.*, 168 Fed. 987.

Georgia has answered the question negatively," the Judge delivering the opinion using this language:

"A corporation may voluntarily make a contract of this sort, but there is no law that we know of which compels it to make one against its wishes. And, speaking for myself, I doubt very much the power of the legislature to enact a law compelling a railroad to make a contract for a through bill of lading beyond its terminus."

Under the Act to Regulate Commerce (secs. 338 and 400, *post*), the Interstate Commerce Commission is given the power, which is frequently exercised, to require connecting carriers to establish through routes and joint rates, and there appears no reason why a state should not, as to intrastate commerce in a proper case, compel carriers to interchange freight.

§ 15. **Regulating Crossings.**—The state may regulate public railroad crossings. The police powers of the state are sufficient to enable them to protect the public from danger at places where railroads cross public streets and roads and where one railroad crosses another. Such regulation, although affecting interstate railroads, falls within the class of legislation "which," as was said by Chief Justice Marshall, "can be most advantageously exercised by the states themselves."<sup>88</sup> Congress has not attempted to legislate on the subject, and that state legislation "relating to railway crossings" is valid has been determined so frequently as to make extensive citation of authorities unnecessary.<sup>89</sup>

88. *Coles v. Central R. & B. Co.*, 86 Ga. 251, 12 S. E. 749; *State v. Wrightsville & Ten. R. Co.*, 104 Ga. 437, 30 S. E. 891; *Wadley So. Ry. Co. v. State*, 137 Ga. 497, 3 S. E. 741. To the same effect, see *Lotsfreich v. Central R. & B. Co.*, 73 Ala. 306; *Gulf, C. & S. F. Ry. Co. v. State*, 56 Tex. Civ. App. 353, 120 S. W. 1028; *Home Tel. Co. v. Granby & Neosho Telephone Co.*, 114 Mo. 1111, 126 S. W. 773.

89. *Gibbons v. Ogden*, 9 Wheat. 22 U. S. 1, 6 L. Ed. 23.

90. *New York & N. E. R. v. Bristol*, 151 U. S. 556, 38 L. Ed. 269, 14 Sup. Ct. 437, extension of grade crossings; *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 42 L. Ed. 948, 18 Sup. Ct. 513, viaduct over a street; *Grand Trunk Ry. Co. v. R. R. Com. of Indiana*, 221 U. S. 400, 55 L. Ed. 786, 31 Sup. Ct. 537, interlocking plant at crossing of two rail-

Similar to the power of the states to regulate crossings is the power to exercise a control over the right of way. A law of Texas prescribing the duty of preventing the growth of particular vegetation was held valid." Regulations requiring guard posts on railroad trestles and bridges, and stock gaps at crossings, are within the police power of a state."

A law of the state of Georgia requires railway locomotives running on the main line to be equipped with electric headlights of a certain prescribed character. Locomotives thus required to be equipped were used in hauling interstate freight, and it was urged that the statute constituted an unwarrantable interference with interstate commerce. The validity of the statute was sustained by the Supreme Court of Georgia," and, upon a writ of error to the Supreme Court of the United States, the judgment of the state court was affirmed. The Supreme Court of the United States cited as controlling, the case of *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. Ed. 853, 17 Sup. Ct. 418, *supra*, where a law prescribing regulations concerning the heating of cars was held valid, and stated the principle applicable to be: "In the absence of legislation by Congress, the states

roads; *Grand Rapids & I. Ry. Co. v. Hunt*, 38 Ind. App. 657, 78 N. E. 358; *St. Louis, I. M. & S. R. Co. v. McNamare*, 91 Ark. 515, 122 S. W. 102, blocking frogs; *State v. Louisville & N. R. Co.*, 177 Ind. 553, 96 N. E. 340; *Atlantic C. L. R. Co. v. Goldsboro*, 232 U. S. 548, 58 L. Ed. 721, 34 Sup. Ct. 364, regulating operation of cars in streets and affirming same styled case, 155 N. C. 356, 71 S. E. 514.

*St. Louis I. M. & S. R. Co. v. Ark.*, 240 U. S. 518, 60 L. Ed. 776, 36 Sup. Ct. 443.

91. *Mo. K. & T. Ry. Co. v. May*, 194 U. S. 267, 48 L. Ed. 971, 24 Sup. Ct. 638; *Chicago T. H. & S. Ry. Co. v. Anderson*, 242 U. S. 283,

61 L. Ed. 302, 37 Sup. Ct. 124.

92. *Alabama Great So. R. Co. v. Fowler*, 104 Ga. 148, 30 S. E. 243; *New York Cent. & H. R. R. Co. v. New York*, 165 U. S. 628, 41 L. Ed. 853, 17 Sup. Ct. 418, affirming 142 N. Y. 646, 37 N. E. 568, holding valid a law relating to heating trains. See the case of *Chicago M. & St. P. R. Co. v. Minneapolis*, 232 U. S. 430, 58 L. Ed. 671, 34 Sup. Ct. 400; same styled case 115 Minn. 460, 133 N. W. 169, Ann. Cas. 1912D, 1027, and cases cited in the opinion of the Supreme Court of the United States.

93. *Atlantic C. L. R. Co. v. Georgia*, 135 Ga. 545, 69 S. E. 725, 32 L. R. A. (N. S.) 20.

are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce."<sup>94</sup> Having in mind that Congress has enacted several safety appliance acts," it would seem that there is reason supporting the argument that Congress has already "occupied the field" wherein "safety in the physical operation of railroad trains" is provided. This decision of the Supreme Court can with difficulty be reconciled with a subsequent decision of the Court, holding that a law of Indiana requiring hand-holds on freight cars used in interstate commerce was void."

§16. **Elevator Charges.**—Transportation, as defined by the Act to Regulate Commerce, *post*, Sec. 337, includes all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

The charges for elevating products as a part of an interstate transportation of such products is clearly not subject to state regulation, but must be prescribed by the Interstate Commerce Commission."

In the Minnesota Rate cases, at pp. 413, 414, of the opinion, Mr. Justice Hughes cited the Granger cases and the Railroad Commission cases, and in referring to the Munn case," said:

"The court had before it the statute of Illinois governing the grain warehouses in Chicago. Through these elevators, located with the river harbor on the one side and the railway tracks on the other, it was necessary, according to the course of trade, for the product of seven or eight states of the West

See as sustaining the comment in the text. Notes 94 and 123, *post*.

94. Atlantic C. L. R. Co. v. Georgia, 234 U. S. 280, 58 L. Ed. 312, 34 Sup. Ct. 829. See note 130.

95. Sec. 330, *post*, appendices B to J.

96. Southern R. Co. v. R. R. Com. of Ind., 236 U. S. 439, 59 L. Ed. 661, 35 Sup. Ct. 304; reversing same styled case, 179 Ind. 23, 100

N. E. 337. Note 112 *post*.

97. Int. Com. Com. v. Dittenbaugh, 222 U. S. 42, 56 L. Ed. 83, 32 Sup. Ct. 22; Union Pac. R. Co. v. Updike Grain Co., 222 U. S. 215, 56 L. Ed. 171, 32 Sup. Ct. 39.

98. Simpson et al., R. R. Com. of Minnesota v. Shepard, 230 U. S. 352, 432, 433, 57 L. Ed. 1511, 33 Sup. Ct. 729; Munn v. Illinois, 94 U. S. (4 Otto) 113, 24 L. Ed. 77.

to pass on its way to the states on the Atlantic coast. In addition to the denial of any legislative authority to limit charges it was urged that the act was repugnant to the exclusive power of Congress to regulate interstate commerce. The court answered that the business was carried on exclusively within the limits of the state of Illinois, that its regulation was a thing of domestic concern and that 'certainly, until Congress acts in reference to their interstate relation, the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction.' In the decision of the railroad cases, above cited, the same opinion was expressed."

Congress did act in 1906, and now the states may not regulate grain and similar elevators save as to elevation not affecting interstate commerce.

§ 17. **Through Routes and Joint Rates.**—The statute provides that, as to transportation, within the Act to Regulate Commerce, the Interstate Commerce Commission may require carriers to establish through routes, the Commission having the power to prescribe the rate and determine the divisions."<sup>99</sup> A state legislative act under which through routes and joint rates are prescribed, is valid when interstate commerce is not directly affected and when the requirement therefor is reasonable.<sup>100</sup> In the absence of a statute, through routing could not be enforced,<sup>101</sup> and, as said by Mr. Justice Holmes,<sup>102</sup>

99. Sec. 399, *post*; and a state commission, as to intrastate commerce, may apportion a joint rate, *State v. Minneapolis & St. L. R. Co.*, 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514, affirmed *Minneapolis & St. L. R. Co. v. State of Minnesota*, 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 900.

100. But such a statute affecting interstate transportation is void, *Lowe v. Seaboard A. L. Ry. Co.*, 63 S. C. 248, 41 S. E. 297, 90 Am. St. Rep. 678.

101. In *Wadley So. Ry. v. State*, 137 Ga. 497, 507, 73 S. E. 741, the Supreme Court of Georgia said: "It is true that railroad companies can not be required to issue through bills of lading, or to contract to forward goods beyond their own lines. *Coles v. Central R. Co.*, 86 Ga. 251, 12 S. E. 749; *State v. W. & T. R. Co.*, 104 Ga. 437, 30 S. E. 891."

102. *Central Stock Yards v. Louisville & N. R. Co.*, 192 U. S. 568, 571, 48 L. Ed. 565, 24 Sup. Ct. 339.

"the requirement to deliver, transfer and transport freight to any point where there is a physical connection between the tracks of the railroad companies must be taken to refer to cases where the freight is destined to some further point by transportation over a connecting line."

As to intrastate commerce, a state may prohibit discrimination by a carrier against another, and where a joint rate is established it is subject to governmental regulation.<sup>103</sup> This does not mean that a carrier may be compelled to make a contract to deliver over another road, but carriers may be compelled to deliver freight to and receive freight from a connecting carrier.<sup>104</sup>

States, however, have no power to compel a carrier to switch cars between a connection with a competing interstate carrier and a designated side track within its own terminals, when such movement is for the accommodation of interstate traffic.<sup>105</sup>

#### § 18. Regulation of the Movement of Trains. Sunday Law.

—The legislature of the state of Georgia prohibited the running of freight trains on any road in the state on Sunday. There were certain exceptions referring to trains carrying live stock and delayed trains. A conviction being had under the statute, and an affirmance thereof by the highest state court, the case was appealed to the Supreme Court. That court sustained the Georgia statute.<sup>106</sup> Mr. Justice Harlan, concluding the opinion, said:

103. *Stephens v. Central of Ga. Ry. Co.*, 138 Ga. 625, 631, 75 S. E. 1041, 42 L. R. A. (N. S.) 541, 1913E, Ann. Cas. 609; *Wadley Southern Ry. Co. v. State*, 137 Ga. 497, 73 S. E. 741. Affirmed: *Wadley S. R. Co. v. Georgia*, 235 U. S. 651, 59 L. Ed. 405, 35 Sup. Ct. 214.

104. § 14, *supra*, *Hudson V. R. Co. v. Boston & M. R. Co.*, 45 Misc. 520, 92 N. Y. Supp. 928, affirmed same styled case, 106 App. Div. 375, 94 N. Y. Supp. 545; *International & G. N. R. Co. v. R. R. Com. of*

Tex., — *Tex. Civ. App.* —, 86 S. W. 16, affirmed same styled case, 99 Tex. 332, 89 S. W. 961; *Inman v. St. L. S. W. R. Co.*, 14 Tex. Civ. App. 39, 37 S. W. 37.

105. *Illinois C. R. Co. v. Railroad Com. of La.*, 236 U. S. 157, 59 L. Ed. 517, 35 Sup. Ct. 275.

106. *Hennington v. Georgia*, 163 U. S. 299, 41 L. Ed. 166, 16 Sup. Ct. 1086; *Simpson, et al., R. R. Com. of Minnesota v. Shepard*, 230 U. S. 352, 432, 433, 57 L. Ed. 1511, 33 Sup. Ct. 729.

"The statute of Georgia is not directed against interstate commerce. It establishes a rule of civil conduct applicable alike to all freight trains, domestic as well as interstate. It applies to the transportation of interstate freight the same rule precisely that it applies to the transportation of domestic freight. And it places the business of transporting freight in the same category as all other secular business. It simply declares that, on and during the day fixed by law as a day of rest for all people within the limits of the state from toil and labor incident to their callings, the transportation of freight shall be suspended.

"We are of the opinion that such a law, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the domain of federal jurisdiction, nor strictly a regulation of interstate commerce, but, considered in its own nature, is an ordinary police regulation designed to secure the well being and to promote the general welfare of the people within the state by which it was established, and therefore not invalid by force alone of the Constitution of the United States."

**§ 19. Same Subject. Requiring the Operation of a Particular Train.**—An order of a railroad commission made under adequate statutory authority, which requires a railroad company to furnish transportation between two points in the state, and to arrange its schedule to make connections with through interstate trains, is not, when required by public convenience, illegal. Nor is such order unreasonable because the operation of the particular train required by the order may entail some pecuniary loss to the carrier.<sup>107</sup>

The Railroad Commission of Kansas, after hearing, ordered an interstate railroad to operate a passenger service from a point within the state to the state line, although the railroad had no station at the state line. The Supreme Court of the United States, having found that the order was not arbitrary

107. *Atlantic C. L. R. Co. v. North Carolina Corp. Com.*, 206 U. S. 1, 51 L. Ed. 933, 27 Sup. Ct. 585, 11 Ann. Cas. 398. The effect on interstate commerce of the order

involved in this case was not considered. This decision affirms *North Carolina Corp. Com. v. Atlantic C. L. R. Co.*, 137 N. C. 1, 49 S. E. 191, 115 Am. St. Rep. 636.

or unreasonable, discussed and determined the contention made, that the order was void because it operated as a direct burden upon interstate commerce. In support of the contention the carrier urged "that the charter of the Interstate Railroad Company, the builder of the branch, provided for a road not only in Kansas but to extend into Texas and Missouri, and therefore for an interstate railroad."

The court held that the charter of the railroad "did not change the nature and character of our constitutional system and, therefore, did not destroy the power of Kansas over its domestic commerce," and that the order being reasonable was not void; and, in concluding the opinion of the court, Mr. Justice (later Mr. Chief Justice) White said:"

"Even if the performance of the duty of furnishing adequate local facilities in some respect affected interstate commerce, it does not necessarily result that thereby a direct burden on interstate commerce would be imposed."

When it was sought to enjoin an order of the New York Public Service Commission, which required the carrier to restore certain trains which had been discontinued, the district judge held, under the facts there of record, that such an order was void. It appeared that, without the trains which had been discontinued, the service accommodated the necessities of the people, and that to operate the additional trains would mean a loss to the carrier. Under the facts the judge aptly said: "What is reasonable and what is reasonably necessary is not to be determined by the occasional wants and wishes and convenience of a very few people living at points along the line."<sup>108</sup> In holding void a statute of Wisconsin requiring "that every village having two hundred or more inhabitants and a post office, and being within one-eighth of a mile of a railroad, must be given by such railroad the accommodation of at least two passenger trains each way each day, if four or more passenger trains are run each way daily,"

108. *Missouri Pac. Ry. Co. v. Kansas*, 216 U. S. 262, 283, 284, 54 L. Ed. 472, 30 Sup. Ct. 330, citing *Atlantic C. L. R. Co. v. Wharton*, 207 U. S. 328, 52 L. Ed. 230, 28 Sup. Ct. 121. See also *State v. Chicago, M. & St. P. R. Co.*, 11 S. D. 282, 77 N. W. 104.

109. *Delaware L. & W. R. Co. v. Van Santwood*, 216 Fed. 252.

the authorities are cited by the Supreme Court and the principles established by the authorities given as follows: "(1) It is competent for a state to require adequate local facilities, even to the stoppage of interstate trains or the rearrangement of their schedules. (2) Such facilities existing—that is, the local conditions being adequately met—the obligation of the railroad is performed, and the stoppage of interstate trains becomes an improper and illegal interference with interstate commerce. (3) And this, whether the interference be directly by the legislature or by its command through the orders of an administrative body. (4) The fact of local facilities this court may determine, such fact being necessarily involved in the determination of the federal question whether an order concerning an interstate train does or does not directly regulate interstate commerce, by imposing an arbitrary requirement."<sup>110</sup>

Sub-divisions 1 and 2 above are illogical. Whether or not a requirement that trains shall stop is reasonable is determinable in part from the extent of existing facilities; but interstate commerce is interstate commerce regardless of the adequacy or inadequacy of local facilities.

§ 20. **Same Subject. Speed of Trains.**—In the absence of legislation by Congress, a city ordinance regulating the speed limit of trains within the city limits, is not as to interstate trains unconstitutional. This law was announced by Mr. Justice Brewer (*Erb v. Morasch*, 177 U. S. 584, 44 L. Ed. 897, 20 Sup. Ct. 819), who said:

"A city, when authorized by the legislature, may regulate the speed of railroad trains within the city limits. *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, 24 L. Ed. 734; *Cleveland, C. C. & St. L. R. Co. v. Illinois ex rel. Jett*, 177 U. S. 514, 44 L. Ed. 868, 20 Sup. Ct. Rep. 722. Such act is, even to interstate trains, one only indirectly affecting interstate commerce, and is within the power of the state until at least Congress shall take action in the matter."

110. *Chicago, B. & Q. R. Co. v. Gulf C. & S. F. R. Co. v. Texas, Railroad Com. of Wis.*, 237 U. S. 246 U. S. 58, 62 L. Ed. 574, 38 Sup. Ct. 236.  
220, 59 L. Ed. 926, 35 Sup. Ct. 560.

A statute of Nebraska fixing a rate of speed for cattle trains moving between points within the state and providing a sum as liquidated damages for its violation, is valid, the Supreme Court of the United States having held that the legislature had power "to impose a limitation of the time for the transportation of live stock" and "to provide a definite measure of damages," such damages being "difficult to estimate or prove."<sup>111</sup>

Confusing unreasonableness of the requirement with the fact that there was a regulation of interstate commerce, and not citing the case of *Erb v. Morasch*, *supra*, the Supreme Court held unconstitutional as a regulation of interstate commerce a statute of Texas applicable to interstate trains which requires railway companies to start passenger trains at the point of origin and at local stations on schedule time, with a margin of thirty minutes.<sup>112</sup>

**§ 21. Same Subject. Requirement That Trains Shall Stop at Particular Stations.**—In determining whether or not a state statute or a regulation of a state commission indirectly affecting interstate commerce is valid, the Supreme Court looks to the facts to see whether or not the regulation is reasonable. To require a train to run at a low rate of speed through a city may cause more delay than to require such train to stop at a particular station three minutes. We have just seen in the preceding section that the limitation of speed was held legal. This was because the regulation was neces-

111. *Chicago, B. & Q. R. Co. v. Cram*, 228 U. S. 70, 84, 57 L. Ed. 734, 33 Sup. Ct. 437, affirming *Cram v. Chicago, B. & Q. R. Co.*, 84 Neb. 607, 122 N. W. 31, 26 L. R. A. (N. S.) 1022, 85 Neb. 586, 123 N. W. 1045, 26 L. R. A. (N. S.) 1028, 19 Ann. Cas. 170; *Chicago, B. & Q. R. Co. v. Kyle*, 228 U. S. 85, 57 L. Ed. 741, 33 Sup. Ct. 440, affirming *Kyle v. C., B. & Q. R. Co.*, 84 Neb. 621, 122 N. W. 37.

112. *Missouri K. & T. R. Co. v. Texas*, 245 U. S. 484, 62 L. Ed. 419, 38 Sup. Ct. 178, see also note L.

*Ed. and Seaboard A. L. R. Co. v. Blackwell*, 244 U. S. 310, 61 L. Ed. 1160, 37 Sup. Ct. 640, L. R. A. 1917F, 1184; *Chicago, B. & Q. R. Co. v. Railroad Com. of Wis.*, 237 U. S. 220, 59 L. Ed. 926, 35 Sup. Ct. 560, P. U. R. 1915C 309; *Lehigh, Covington & C. St. R. Co. v. Covington*, 235 U. S. 537, 59 L. Ed. 350, 35 Sup. Ct. 158, L. R. A. 1915F, 792, P. U. R. 1915A. 231, In the *Seaboard A. L. R. Co.* case *infra*, the Georgia Blow Post law is held invalid. See also note 110, *supra*.

sary and reasonable. A regulation, however, to stop an interstate train at a point where reasonable facilities for travel already exist is unreasonable and an invalid attempt to regulate interstate commerce."<sup>113</sup> This is true because the regulation was not a reasonable exercise of the police power of the state. The opinion written by Mr. Justice Peckham concludes:

"The transportation of passengers on interstate trains as rapidly as can with safety be done is the inexorable demand of the public who use such trains. Competition between great trunk lines is fierce and at times bitter. Each line must do its best even to obtain its fair share of the transportation between states, both of passengers and freight. A wholly unnecessary, even though a small, obstacle, ought not, in fairness, to be placed in the way of an interstate road, which may thus be unable to meet the competition of its rivals. We by no means intend to impair the strength of the previous decisions of this court on the subject, nor to assume that the interstate transportation, either of passengers or freight, is to be regarded as overshadowing the rights of the residents of the state through which the railroad passes to adequate railroad facilities. Both claims are to be considered, and after the wants of the residents within a state or locality through which the road passes have been adequately supplied, regard being had to all the facts bearing upon the subject, they ought not to be permitted to demand more, at the cost of the ability of the road to successfully compete with its rivals in the transportation of interstate passengers and freight."

A requirement of the law of the state of Illinois that an interstate mail and passenger train should run to a county seat three and a half miles off the main line is an unconstitutional interference and obstruction of interstate commerce."<sup>114</sup> A purely local train, however, although carrying passengers and mail destined to points beyond the state, may properly

113. *Mississippi Railroad Com. v. St. L. & S. F. R. Co.*, 105 Mo. v. Ill. Cent. R. Co., 203 U. S. 335, App. 207, 79 S. W. 714.  
51 L. Ed. 209, 27 Sup. Ct. 90. See 114. Ill. Cent. R. Co. v. Illinois, notes 54 L. Ed. U. S. Reports 970, 163 U. S. 142, 41 L. Ed. 107, 16 14 L. R. A. (N. S.) 293, and State Sup. Ct. 1096.

be required to stop at county seats directly on the line traversed by such train."<sup>115</sup>

The Mississippi case, *supra*, may, upon a casual reading, appear in conflict with a former decision of the Supreme Court.<sup>116</sup> The cases, however, are easily distinguishable. In the Mississippi case the facts showed that there were reasonable facilities for travel without enforcing the order therein under investigation. In the Ohio case all trains up to three each way each day were required to stop. Ultimately the question of whether or not a particular police regulation is reasonable must be passed upon by the courts and in one case the Supreme Court held the regulation to stop unnecessary and, therefore, unreasonable. In the other, under the facts, the regulation was necessary and, therefore, reasonable. The Ohio case cites and discusses the authorities, and the conclusion of the opinion makes reference to the rule adopted subsequently in the Mississippi case. This conclusion is as follows:

"Our present judgment has reference only to the case before us, and when other cases arise in which local statutes are alleged not to be legitimate exertions of the police powers of the state, but to infringe upon national authority, it can then be determined whether they are to be controlled by the decision now rendered. It would be impracticable, as well as unwise, to attempt to lay down any rule that would govern every conceivable case that might be suggested by ingenious minds."

The Mississippi case was followed upon similar facts.<sup>117</sup>

The conclusion quoted above leaves the decision of each case to be determined by the court from its view of the particular facts, the principle applied being that interstate commerce may be indirectly affected to the extent necessary to furnish "adequate and reasonable facilities." This in effect gives the states some control over interstate commerce,

115. *Gladson v. Minnesota*, 166 U. S. 427, 41 L. Ed. 1064, 17 Sup. Ct. 627.

116. *Lake S. & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. Ed. 702, 19 Sup. Ct. 465.

117. *Atlantic C. L. R. Co. v. Wharton*, 207 U. S. 328, 52 L. Ed. 230, 28 Sup. Ct. 121; *Herndon v. Chicago R. I. & P. R. Co.*, 218 U. S. 135, 54 L. Ed. 970, 30 Sup. Ct. 633.

the Supreme Court having the power in each particular case to say whether or not that control shall be permitted. As indicated in sections 19 and 20 above, it seems that a more logical conclusion could be reached by enforcing the constitutional right of interstate transportation, fully regulated by Congress, to be free of state regulation. The difficulties of applying the rule are stated by Mr. Justice McKenna in a decision holding a Wisconsin statute invalid<sup>118</sup> and are illustrated when that decision is read with a later one holding a Texas regulation valid.<sup>119</sup>

**§ 22. State Regulation of Carriers and Their Employees.**

—A state statute requiring engineers to be examined and licensed is not void, although it may incidentally and remotely affect interstate commerce.<sup>120</sup>

A law of a state forbidding those affected with color blindness from acting as locomotive engineers is a valid exercise of the state's police power.<sup>121</sup> In sustaining the above principle, Mr. Justice Field said:

"It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties and liabilities of employees and others on railway trains engaged in that commerce; and that such legislation will supersede any state action on the subject. But until such legislation is had, it is clearly within the competency of the state to provide against accidents on trains whilst within their limits. Indeed, it is a principle fully recognized by decisions of state and federal courts, that wherever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power

118. *Chicago, B. & Q. R. Co. v. R. R. Com. of Wis.*, 237 U. S. 220, 59 L. Ed. 926, 35 Sup. Ct. 560, P. U. R. 1915C, 309.

119. *Gulf C. & S. F. Ry. Co. v. Texas*, 246 U. S. 58, 62 L. Ed. 574, 38 Sup. Ct. 236. See also note 112 and sections 19 and 20, *supra*, notes in 59 L. Ed. 926; in 62 L. Ed. 574, 575; in 44 L. R. A. (N. S.) 478; in 29 L. R. A. (N. S.)

159; in 17 L. R. A. (N. S.) 821 and in 14 L. R. A. (N. S.) 293; and see *Missouri, K. & T. R. Co. v. Texas*, 245 U. S. 484, 62 L. Ed. 419, 38 Sup. Ct. 178, note 112, *supra*.  
120. *Smith v. Alabama*, 124 U. S. 465, 31 L. Ed. 508, 8 Sup. Ct. 564, 1 I. C. R. 804.

121. *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. Ed. 352, 9 Sup. Ct. 28.

of the states, but it is among their plain duties, to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable."

Under this principle, a state law requiring a certain number of employees to a train, known as the Full Crew Law, is valid.<sup>122</sup> A law requiring an electric head light on engines has been held valid, although it is near the margin of the power of a state if it does not offend against the commerce clause of the federal Constitution.<sup>123</sup>

If a state can not regulate the employees of railroads in so far as they are engaged in intrastate commerce, they can not be regulated.<sup>124</sup>

Congress having in 1908 passed a second Employees' Liability Act, which is valid, the passage of that act removed that subject from the sphere of state action.<sup>125</sup> There being nothing in the federal laws to conflict therewith, it is within the power of a state legislature to require carriers to pay employees wages

122. *Chicago, R. I. & P. Ry. Co. v. Arkansas*, 86 Ark. 412, 111 S. W. 456; for note see 32 L. R. A. (N. S.) 22; *Chicago, R. I. & P. Ry. Co. v. Arkansas*, 219 U. S. 453, 55 L. Ed. 290, 31 Sup. Ct. 275. But a law of Texas prohibiting anyone from acting as a conductor on a railway train without previous service as a brakeman is void as a denial of the equal protection of the law. *Smith v. Texas*, 233 U. S. 630, 58 L. Ed. 1129, 34 Sup. Ct. 681; reversing same styled case, 63 Tex. Cr. App. 183, 146 S. W. 900. The requirement of a specified crew in switching across streets sustained. *St. Louis I. M. & S. R. Co. v. Arkansas*, 240 U. S. 518, 60 L. Ed. 776, 36 Sup. Ct. 443.

123. *Atlantic C. L. R. Co. v. State of Georgia*, 135 Ga. 545, 69 S. E. 725, 32 L. R. A. (N. S.) 20; same styled case, 234 U. S. 280,

58 L. Ed. 1312, 34 Sup. Ct. 829. The Supreme Court has indicated that since the passage of the Act of March 4, 1915 (Chap. 168, 38 Stat. L. 1192, Fed. Stat. Ann. 8638a) this decision may not be controlling. *Vandalla R. Co. v. Pub. Serv. Com. of Ind.*, 242 U. S. 255, 61 L. Ed. 276, 37 Sup. Ct. 93.

124. *Howard v. Illinois C. R. Co.*, 207 U. S. 463, 52 L. Ed. 297, 28 Sup. Ct. 141. See a discussion of *Smith v. Alabama* and similar cases in dissenting opinion of Mr. Justice Moody.

125. For a discussion of this Act see *post*, Sec. 332; see also *Northwestern Pac. Ry. Co. v. Washington*, 222 U. S. 370, 66 L. Ed. 237, 32 Sup. Ct. 160; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305; reversing same styled case, 156 N. C. 496, 72 S. E. 858; *Erie R.*

semi-monthly, although the carriers and employees are engaged in interstate commerce.<sup>126</sup>

Congress having acted upon the subject of the hours of labor of interstate railway employees,<sup>127</sup> the subject is beyond state control, and a state law fixing such hours for a shorter period than those fixed by the federal statute, is void.<sup>128</sup>

§ 23. **Blowing Whistle and Checking Speed at Crossings.**—In the absence of congressional action upon the same subject matter, states may regulate “the manner in which interstate trains shall approach dangerous crossings, the signals which shall be given, and the control of the train which shall be required under such circumstances. Crossings may be so situated in reference to cuts or curves as to render them highly dangerous to those using the public highways. They may be in or near towns or cities, so that to approach them at a high rate of speed would be attended with great danger to life or limb. On the other hand, highway crossings may be so numerous and so near together that to require interstate trains to slacken speed indiscriminately at all such crossings would be practically destructive of the successful operation of such passenger trains. Statutes which require the speed of such trains to be checked at all crossings so situated might not only be a regulation, but also a direct burden upon interstate commerce, and therefore beyond the power of the state to enact.”

This quotation states a general rule, the application of which to a Georgia statute requiring an interstate carrier to check its trains at public crossings resulted in a holding that the statute was valid.<sup>129</sup>

In this decision the question was not fully presented and

R. Co. v. Williams, 233 U. S. 685, 58 L. Ed. 1155, 34 Sup. Ct. 761; affirming same styled case 199 N. Y. 525, 92 N. E. 1084, 136 App. Div. 902, 120 N. Y. Sup. 1023.

126. State v. Missouri Pac. R. Co., 242 Mo. 339, 147 S. W. 118.

127. Appendix F, Sec. 331, *post*. Wilson v. New, 243 U. S. 332, 61 L. Ed. 755, 37 Sup. Ct. 298.

128. Erie R. Co. v. New York, 233 U. S. 671, 58 L. Ed. 1149, 34 Sup. Ct. 756, reversing, Erie R. Co. v. New York, 198 N. Y. 369, 91 N. E. 849, 29 L. R. A. (N. S.) 240, 139 Am. St. Rep. 829, 19 Ann. Cas. 811.

129. So. Ry. Co. v. King, 217 U. S. 524, 533, 534, 54 L. Ed. 868, 30 Sup. Ct. 594.

the conclusion was not followed when the same Georgia statute came again under review.<sup>130</sup>

§ 24. **Furnishing Cars for the Receipt and Delivery of Shipments.**—Prior to the passage of the Hepburn Act<sup>131</sup> the Texas legislature passed a law prescribing rules under which carriers should furnish cars to shippers. A penalty was fixed as follows:

“When cars are applied for under the provisions of this chapter, if they are not furnished the railway company so failing to furnish them shall forfeit to the party or parties so applying for them the sum of \$25 per day for each car failed to be furnished, to be recovered in any court of competent jurisdiction, and all actual damages such applicant may sustain.”

The only excuse which the carrier could give to escape the penalty was “strikes or other public calamity.” The Texas Court of Civil Appeals having sustained a judgment for a penalty under the statute<sup>132</sup> the cause was appealed to the Supreme Court, and that court determined the question of whether the regulation was reasonable, as it had a right to do, the regulation affecting interstate commerce. The Texas statute was held void as being an unreasonable regulation of interstate commerce. Mr. Justice Brown, delivering the opinion said:<sup>133</sup>

“While there is much to be said in favor of laws requiring railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length, and frequency of stops, for the heating, lighting, and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the state, and amounts to a

130. *Seaboard A. L. R. Co. v. Blackwell*, 244 U. S. 310, 61 L. Ed. 1160, 37 Sup. Ct. 640.

131. *Post*, Secs. 335 to 338.

132. *Houston & T. C. R. Co. v. Mayes*, 36 Tex. Civ. App. 606,

609, 83 S. W. 53, 55.

133. *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. Ed. 772, 26 Sup. Ct. 491. See also, *So.*

*Ry. Co. v. Melton*, 133 Ga. 277, 65 S. E. 665.

burden upon interstate commerce. It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other states, or in other places within the same state, it makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts, or other unavoidable consequences of heavy weather."

Had the regulation allowed all proper excuses for failing to furnish the cars, it would have been reasonable and, therefore valid. In concluding the opinion, Mr. Justice Brown said:

"Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the legislature."

The Texas courts have held that the law discussed above was valid as to intrastate commerce.<sup>134</sup>

§ 25. **Same Subject. Rule Since Hepburn Act.**—In *Southern Railway Co. v. Reid*,<sup>135</sup> a statute of the State of North Carolina requiring that freight be received, when tendered, and forwarded by a route selected by the shipper under penalty of \$50 a day and actual damages, was held invalid when applied to an interstate shipment. This decision was placed upon the ground that there was a conflict between the federal and the state statutes, although the court cited the *Mayes* case, *supra*, and pointed out that the state statute and the state decisions relating thereto left no doubt as to what excuses or

134. *Allen v. Tex. & P. Ry. Co.*, 100 Tex. 825, 101 S. W. 792, reversing same styled case, Texas Civ. App., 98 S. W. 450; *Texas & P. Ry. Co. v. Taylor*, 42 Tex. Civ. App. 331, 118 S. W. 1097; *Texas & P. Ry. Co. v. Andrews*, 54 Tex. Civ. App. 418, 118 S. W. 1101, 55 Tex. Civ. App. 302. See Section 197a, *post*, and as bearing on the

general question, *Penn. R. Co. v. Sonman Shaft Coal Co.*, 242 U. S. 120, 61 L. Ed. 188, 37 Sup. Ct. 46; *U. S. v. Penn. R. Co.*, 242 U. S. 208, 61 L. Ed. 251, 37 Sup. Ct. 95; *Sou. Pac. Co. v. Stevenson*, 258 Fed. 165, — C. C. A. —.

135. *So. Ry. Co. v. Reid*, 222 U. S. 424, 56 L. Ed. 257, 32 Sup. Ct. 140.

defenses might be offered for a failure to comply with the law. In the course of the opinion, Mr. Justice McKenna took occasion to describe the wide scope of the Acts to Regulate Commerce. He said (p. 440):

"There is scarcely a detail of regulation which is omitted to secure the purpose to which the Interstate Commerce Act is aimed. It is true that words directly inhibitive of the exercise of state authority are not employed, but the subject is taken possession of."

In the *Hardwick Elevator* case<sup>136</sup> the Chief Justice, after referring to Sections 1, 8, 9 and 10<sup>137</sup> of the Act to Regulate Commerce as amended by the Hepburn Act, said:

"As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the state had a right to exert its authority in the absence of legislation by Congress, it must follow in consequence of the action of Congress to which we have referred that the power of the state over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme."

The application of this principle to the Minnesota Reciprocal Demurrage Law there involved resulted in holding that law void. The state court held that the law applied to both interstate and intrastate commerce and that the regulation was valid and within the principle that Congress not having acted, the state might.<sup>138</sup> The principle was not denied by the

136. *Chicago, R. I. & P. Ry. Co. v. Hardwick Farmers Elevator Co.*, 226 U. S. 426, 57 L. Ed. 284, 33 Sup. Ct. 174; Sec. 22, *supra*. Sec. 306 first edition was cited in the argument in this case, p. 431.

137. *Post*. §§ 335, 338, 382, 383. For regulation of demurrage charges by the Int. Com. Com. see: *Wilson Prod. Co. v. Penn. R. Co.*,

16 I. C. C. 116, 121; *Peale, Peacock & Kerr v. Cent. R. Co. of N. J.*, 18 I. C. C. 25, 35; Re demurrage investigation, 19 I. C. C. 496, 498; *Lehigh Valley R. Co. v. United States*, 188 Fed. 879, 887.

138. *Hardwick Elevator Co. v. Chicago, R. I. & P. R. Co.*, 110 Minn. 25, 124 N. W. 819, 9 Ann. Cas. 1088.

Supreme Court, but it was held that Congress had acted, and that as Congress had covered the whole field the state was thereby rendered "impotent to deal with a subject over which it had no inherent but only permissive power."

Following the Elevator case, the Supreme Court has held void a Mississippi regulation concerning the "delivery of cars at the termination of interstate commerce transportation,"<sup>139</sup> and an Arkansas statute relating to reciprocal demurrage.<sup>140</sup>

The states may not regulate rates "on that part of interstate carriage which includes the actual placing of the shipment into vessels ready to be carried beyond the state."<sup>141</sup>

A state may regulate the parking of taxicabs and the rate of charges within the state, although at times such vehicles may be used in interstate commerce.<sup>142</sup>

There is nothing in the federal law which would make invalid a state law which permits the recovery of damages for failure to deliver or transport interstate freight in a reasonable time, such law being merely a statement of the common law on the subject and being in no way in conflict with any provision of the Act to Regulate Commerce.<sup>143</sup>

A municipal ordinance compelling an express company to give a bond conditioned "for the safe and prompt delivery of all baggage," etc., intrusted to it or its agents, in so far as it applied to interstate commerce was held to be void, be-

139. *Yazoo & M. V. R. Co. v. Greenwood Grocery Co.*, 227 U. S. 1, 57 L. Ed. 389, 33 Sup. Ct. 213, reversing same styled case, 96 Miss. 403, 51 So. 450.

140. *St. Louis, I. M. & S. Ry. v. Edwards*, 227 U. S. 265, 57 L. Ed. 506, 33 Sup. Ct. 26; see also Arkansas statute as to distribution of cars, *St. Louis Ry. Co. v. Arkansas*, 217 U. S. 136, 54 L. Ed. 698, 30 Sup. Ct. 476.

141. *Oregon R. R. Com. v. Worthington*, 225 U. S. 101, 56 L. Ed. 1087, 32 Sup. Ct. 653. Requiring double decked cars on interstate shipments is an illegal regulation by a state; *Stanley v.*

*Wabash, St. L. & P. R. Co.*, 100 Mo. 435, 13 S. W. 709, 8 L. R. A. 549, where is found numerous citations of authorities.

142. *Yellow Taxicab Co. v. Gaynor* (Taxicab cases), 82 Miss. R. 94, 143 N. Y. Supp. 279.

143. *Western & A. R. Co. v. Symmerour*, 139 Ga. 545, 77 S. E. 802; *Oliver v. Chicago, R. I. & P. R. Co.*, 89 Ark. 466, 117 S. W. 238, holding law valid as to intrastate and invalid as to interstate commerce; *Yazoo & M. V. R. Co. v. Keystone Lumber Co.*, 90 Miss. 391, 43 So. 605, no interstate commerce was here moved; *Zetterberg v. Great N. Ry. Co.*, 117

cause as said in the opinion of the court: "Congress has exercised its authority and has provided its own scheme of regulation."<sup>144</sup>

A state statute which merely required a railroad company to furnish cars within a reasonable time after demand and which, as construed, left the question of what was a reasonable time to be determined in view of the requirements of interstate commerce, is not a direct burden thereof and is valid. This statute is nothing but a statement of the carrier's common law duty to furnish the necessary equipment enabling it to perform its undertaking of public transportation.<sup>145</sup>

§ 26. **Same Subject. Rule Established.**—Where a state statute or regulation conflicts with a federal regulation affecting interstate commerce, the state law is void. In the absence of a federal statute the states may not make regulations directly burdening interstate commerce. Congress has taken possession of the field of regulation as to the receipt and delivery of freight moving in interstate commerce and no direct control with reference thereto can be exercised by state authority. Any regulation by a state of an interstate carrier affects to some extent interstate commerce, and it is clearly intimated by Mr. Justice Hughes in the Minnesota Rate cases,

Minn. 495, 136 N. W. 225, decided before *Hardwick Elevator* case, note, *Supra*. Statutes providing penalties for unreasonable delay of intrastate shipments valid, *Lexington Grocery Co. v. So. Ry. Co.*, 136 N. C. 396, 48 S. E. 801; *Stone v. Atlantic C. L. Ry. Co.*, 144 N. C. 220, 56 S. E. 932, and cases cited; *Rollins v. Seaboard A. L. Ry.*, 146 N. C. 218, 59 S. E. 671; but carrier relieved if conditions causing delay results from causes for which it is not responsible, *Garrison v. So. Ry. Co.*, 150 N. C. 575, 64 S. E. 578. Discrimination in order of shipments prohibited: *Hill & Morris v. St. L. S. W. Ry. Co. of Texas*, 75 S. W. 874, reversed on the construction

of the statute, *St. L. S. W. Ry. Co. of Texas v. Hill & Morris*, 97 Tex. 506, 80 S. W. 368; *Tex. C. R. Co. v. Hannay-Frerichs & Co.*, —, Tex. Civ. App. —, 130 S. W. 250. delay caused by not shipping on Sunday no ground for recovering penalty, *Cram v. Chicago, B. & Q. R. Co.*, 84 Neb. 607, 122 N. W. 31, rehearing denied 123 N. W. 1045, 26 L. R. A. (N. S.) 1028, 19 Ann. Cas. 170.

144. *Barrett v. New York*, 232 U. S. 14, 58 L. Ed. 483, 34 Sup. Ct. 203, reversing same styled case, 183 Fed. 793, 189 Fed. 268.

145. *Ill. C. R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275, 59 L. Ed. 1306, 35 Sup. Ct. 760.

*supra*, that Congress might so extend the scope of Federal regulation as to exclude even this remote effect of state legislation. But in the same cases it was shown that Congress has not as yet exercised the full power that it might under the Constitution of the United States and that the proviso exempting intrastate commerce from the Acts to Regulate Commerce leaves a field for state action.<sup>146</sup> The Commerce Acts amendatory and supplementary are not so inclusive nor so exclusive as are the laws relating to the rights and protection of employees,<sup>147</sup> and the decision under the Employees Protective Acts go further than they do under the commerce regulating acts. The decision relating to furnishing cars and holding state statutes on the subject illegal do not go so far as to hold that a state may not legislate as to the furnishing and the delivery of cars used in the shipment of freight between points in the state. But while there is left to the states a power of regulation as to intrastate transportation, such power must not be exercised in a way to burden interstate transportation.

A state may not require that cars be furnished for intrastate commerce when the requirement would, if obeyed, prevent a carrier from furnishing cars for interstate commerce in like proportion. The state regulation must not discriminate in favor of intrastate commerce or against interstate commerce.

These principles were illustrated by the decision of the Supreme Court in *Hampton v. St. Louis I. M. & S. Ry. Co.*<sup>148</sup> where a law of Arkansas was involved requiring an interstate carrier to furnish cars on demand, the section of the law making the requirement concluding with the proviso:

"Interstate railroads shall furnish cars on application for interstate shipments the same in all respects as other cars to be furnished by intrastate railroads under the provisions of this Act."

146. For proviso, see Sec. 336. *post.*

147. Employers' Liability Acts, Sec. 332, *post.* On this subject the Sup. Ct. *Kinzell v. C. M. & St. P. R. Co.*, 248 U. S. 552, 63 L. Ed. 39 Sup. Ct. —.

148. *Hampton v. St. L. I. M. & S. Ry. Co.*, 227 U. S. 456, 57 L. Ed. 596, 33 Sup. Ct. 263, reversing *St. L. I. M. & S. Ry. Co. v. Hampton*, 162 Fed. 693.

The Supreme Court of the state said:“

“The failure to furnish cars under the terms of the act under investigation will establish *prima facie* a breach of duty on the part of the railroad companies. This will not preclude their right to set up such defense as will excuse or justify the failure. That a fair division of cars with interstate business made it impossible to answer all demands made for cars for intrastate business would apparently be within the limit of proper defenses in cases of demands too unusual to be foreseen; and, viewed in this way, the act is relieved of the imputation of burdening interstate commerce.”

Mr. Justice Lurton, speaking for the Supreme Court of the United States, said that the proviso probably meant no more than that there should be “no discrimination against demands for cars for interstate shipments,” but should the act be construed “as extending the act so as to regulate the furnishing of cars for interstate shipments, it would be invalid by reason of the provisions of the Hepburn Amendment to the Act to Regulate Commerce of June 29, 1906.”

Construing the act as applying only to intrastate commerce and as permitting the defenses stated by the court of the state, the Supreme Court held that, under the pleadings, the agreement of the parties and the ruling of the court below, there was no showing by the railroad “that in the operation of the act interstate commerce has been illegally restrained or burdened, or that any defense which it may have for the neglect to comply with the provisions of the act as to furnishing cars has been or will be denied by virtue of its obligation as an interstate railroad,” and that the act should not have been enjoined.<sup>150</sup>

Bills of lading are but contracts for carriage, and when they refer to interstate transportation the federal government may make regulations with reference thereto, and when the transportation is intrastate the regulations are within the power of the states.<sup>151</sup>

149. *Oliver v. Chicago, R. I. & P. Ry. Co.*, 89 Ark. 466, 470, 117 S. W. 238. See also *Proctor & Gamble v. United States*, 225 U. S. 282, 286, 56 L. Ed. 1091, 32 Sup. Ct. 761.  
150. See *Mulberry Hill Coal Co. case*. Sec. 25, *supra*.  
151. *Bills of Lading*, 29 I. C. C. 417; *Bill of Lading*, 52 I. C. C.

§ 27. **Requirements as to Accounting and Reports.**—The Interstate Commerce Commission has the statutory power to require of carriers within its jurisdiction to keep such accounts as may be prescribed and make reports to the Commission upon certain prescribed forms.<sup>152</sup> These statutory requirements are valid.<sup>153</sup> As all, or at least practically all, carriers within the jurisdiction of the Interstate Commerce Commission are at the same time engaged in both interstate and intrastate commerce, these accounts and reports must of necessity include matter relating to each kind of commerce.

It is frequently necessary to consider the cost of both interstate and intrastate commerce in order to determine what is a fair rate on either.

The United States Supreme Court has stated the reasons for the Federal statute as follows:<sup>154</sup>

"It is true that the accounts required to be kept are general in their nature and embrace business other than such as is necessary to the discharge of the duties required in carrying passengers and freight in interstate commerce by joint arrangement between the railroad and the water carrier, but the Commission is charged under the law with the supervision of such rates as to their reasonableness and with the general duty of making reports to Congress which might require a knowledge of the business of the carrier beyond that which is strictly of the character mentioned. If the Commission is to successfully perform its duties in respect to reasonable rates, undue discriminations and favoritism, it must be informed as to the business of the carriers by a system of accounting which will not permit the possible concealment of forbidden practices in accounts which it is not permitted to see and concerning which it can require no information. It

671; *United States v. Ferger*, — Co., 224 U. S. 194, 211, 56 L. Ed. U. S. —, 63 L. Ed. —, 39 Sup. Ct. 729, 32 Sup. Ct. 436. See the Commission's discussion of the question in the Twenty-seventh Annual Report of the Interstate Commerce Commission, pp. 37, 38.

152. Sec. 433, *post*. Separation of Operating Expenses, 30 I. C. C. 676.

153. *Kansas C. S. Ry. Co. v. United States*, 231 U. S. 423, 58 L. Ed. 296, 34 Sup. Ct. 125; *Interstate Com. Com. v. Goodrich Transit*

154. *Interstate Com. Com. v. Goodrich Transit Co.*, *supra*.

is a mistake to suppose that the requiring of information concerning the business methods of such corporations, as shown in their accounts, is a regulation of business not within the jurisdiction of the Commission, as seems to be argued for the complainants. The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act that it may properly regulate such matters as are really within its jurisdiction. Further, the requiring of information concerning a business is not regulation of that business."

Consistent with this holding is the decision of the Court of Civil Appeals of Texas, that the state may require that carriers as to intrastate commerce shall keep accounts supplementary to those required by the Interstate Commerce Commission.<sup>155</sup>

**§ 28. Transmission and Delivery of Telegraph and Telephone Messages.**—That companies engaged in the telegraph and telephone business are, where their lines extend from one state to another, engaged in interstate commerce is undisputed,<sup>156</sup> and Congress has legislated expressly including such within the Acts relating to commerce.<sup>157</sup>

155. *R. R. Com. of Texas v. Texas & P. Ry.*, — Tex. Civ. App. —, 140 S. W. 829. To the same effect see *R. R. Com. of Miss. v. Gulf & S. I. R. Co.*, 8 Miss. 750, 29 So. 789; *People v. Joline*, 65 Misc. Rep. 394, 121 N. Y. Supp. 857. But without statutory authority a commission may not require reports by telegraph. *State v. Louisville & N. R. Co.*, 57 Fla. 526, 49 So. 39.

156. Sec. 2, note 2, *supra*; *Western Union Tel. Co. v. Crovo*, 220 U. S. 364, 55 L. Ed. 498, 31 Sup.

Ct. 399; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 30 L. Ed. 1187, 7 Sup. Ct. 1126; *Western Union Tel. Co. v. James*, 162 U. S. 650, 40 L. Ed. 1105, 16 Sup. Ct. 934; *Western Union Tel. Co. v. Commercial Milling Co.*, 218 U. S. 403, 416, 54 L. Ed. 1088, 31 Sup. Ct. 59; *Postal Tel.-Cable Co. v. City of Mobile*, 179 Fed. 955, and cases cited at page 960.

157. Act 1910, Secs. 335, 340, *post*; *Shoemaker v. Chesapeake & P. Telephone Co.*, 20 I. C. C. 614.

Prior to the Act of 1910 enlarging the scope of the Act to Regulate Commerce, state statutes regulating the delivery of telegraph messages had been before the Supreme Court. The Indiana statute regulating interstate messages sent from as well as into the state was held void because the state law could "not extend to the delivery of messages in other states."<sup>158</sup>

The Georgia statute providing a penalty for failure to receive and deliver in the state telegraph messages was held valid although applicable to interstate messages.<sup>159</sup>

A Michigan statute which prevented the telegraph company from contracting to relieve itself from its common law liability merely gave sanction to an inherent duty, and the statute was held not to be void under the commerce clause of the Constitution of the United States.<sup>160</sup>

A state law relating to the delivery of a telegram and providing a penalty was held void when the default occurred within a navy yard,<sup>161</sup> although the same law when delivery was made in the territory within the jurisdiction of the state was, in an opinion following the Georgia and Michigan cases, *supra*, held valid.<sup>162</sup>

In the last cited case the court said:

"The requirement of the Virginia statute as here applied is a valid exercise of the power of the state in the absence of legislation by Congress. It is neither a regulation of nor a hindrance to interstate commerce, but is in aid of that commerce."

Similar language calling attention to the "absence of legislation by Congress" appears in the cases relating to the Georgia and Michigan statutes. As the Amendment of 1910 says that "telegraph, telephone and cable companies (whether wire or wireless) engaged in sending messages from one state, territory, or district of the United States to any other state, territory, or district of the United States or to any foreign

158. *Western Union Tel. Co. v. Pendleton, supra.*

159. *Western Union Tel. Co. v. James, supra.*

160. *Western Union Tel. Co. v. Commercial Milling Co., supra.*

161. *Western Union Tel. Co. v. Chiles*, 214 U. S. 274, 53 L. Ed. 994, 29 Sup. Ct. 613.

162. *Western Union Tel. Co. v. Crovo, supra.*

country. \* \* \* shall be considered and held to be common carriers within the meaning and purpose of this Act," there is legislation by Congress and it would seem that the decisions relating to the delivery of interstate freight, sections 24 & 25, *supra*, would be applicable to interstate messages, and that state laws regulating the receipt and delivery of telegrams and telephone messages from points in one state to points in another are void.

When the President under authority of an Act of Congress had taken over telephone and telegraph lines rates prescribed under his direction superseded intrastate rates prescribed by state authority.<sup>163</sup>

§ 29. **Separate Coach Laws.**—The statute of Louisiana, which, as construed by the courts of that state, compelled common carriers to receive, in compartments set aside for whites only, negro passengers, was held by the Supreme Court to be invalid in so far as it affected interstate commerce.<sup>164</sup> The court quoted from the opinion of Mr. Justice Field, in *Welton v. Missouri*,<sup>165</sup> to the effect that, "inaction (by Congress) \* \* \* is equivalent to a declaration that interstate commerce shall remain free and untrammelled," and said:

"Applying that principle to the circumstances of this case, congressional inaction left Benson at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the state court, seeks to take away from him that power so long as he is within Louisiana; and while recognizing to the fullest extent the principle which sustains a statute, unless its unconstitutionality is clearly established, we think this statute, to the extent that it requires those engaged in the transportation of passengers among the states to carry colored

163. 40 Stat. at L. 904, Chap. 154, Comp. Stat. 1918, Sec. 3115-¾. Dakota Cent. Tel. Co. v. South Dakota, 249 U. S. —, 63 L. Ed. —, Sup. Ct. —.

164. *Hall v. De Cuir*, 95 U. S. 485, 5 Otto 485, 24 L. Ed. 547.  
165. *Welton v. Missouri*, 91 U. S. 275, 282, 23 L. Ed. 347, 350.

passengers in Louisiana in the same cabin with whites, is unconstitutional and void."

While this decision has been criticised by text book writers, it is sound in principle. Carriers may not unjustly discriminate between those who patronize them, but they are free, subject to that rule and the further one that charges must not be unreasonable, to regulate the general conduct of their business. It can not be held an unjust discrimination to require whites and negroes to ride in separate compartments of a public conveyance, the accommodations being equal. For the negro to contend that he is discriminated against in favor of the white man would be a contention on his part of inferiority to the white man. The separation of equals discriminates in favor of neither. Whatever may be said as to the actual inferiority of the negro, he is, under the law, entitled to equal rights with the other races.

The state of Mississippi has a law requiring railroads carrying passengers to give "separate accommodations to white and colored races," by furnishing either separate coaches or separate compartments in the same coach. The law was construed by the state courts as applying only to commerce within the state. The Supreme Court of the United States held the law valid.<sup>166</sup> The decision is in harmony with the case of *Hall v. DeCuir*, *supra*. In the Louisiana case the regulation affected interstate commerce and was invalid; in the Mississippi case the regulation did not affect interstate commerce and was valid. In the Mississippi case the court said:

"The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the state, and is not commerce among the states, or interstate commerce, but is exclusively commerce within the state. So far, therefore, as this class of transportation, as an element of commerce, is affected by the statute under consideration, it is not subject to the constitutional provision concerning commerce among the states. It has often

166. *Louisville N. O. & T. P. Ry. Co. v. Mississippi*, 133 U. S. 587, 33 L. Ed. 784, 10 Sup. Ct. 348, 2 I. C. R. 801. This case in the Supreme Court of Mississippi was styled *Louisville, N. O. & T. Ry. Co. v. Mississippi*, 66 Miss. 662, 5 L. R. A. 132, 6 So. 303, 2 I. C. R. 615, 14 Am. St. Rep. 509.

been held in this court, and there can be no doubt about it, that there is a commerce wholly within the state, which is not subject to the constitutional provision, and the distinction between commerce among the states and the other classes of commerce between citizens of a single state, and conducted within the state. So far, therefore, as this class of transportation is recognized in this court, although it may not be always easy, where the lines of these classes approach each other, to distinguish between the one and the other."

Louisiana subsequently passed a separate coach law, which the Supreme Court sustained, as it affected only commerce in that state.<sup>167</sup>

A similar law in Kentucky was also sustained by the Supreme Court.<sup>168</sup>

A state statute requiring the separation of interstate passengers would be void as an attempt to regulate interstate commerce, but, as said in *Hall v. De Cuir*, *supra*, Congress having failed to act, to subject of the separation of the races in interstate transportation is unregulated and interstate carriers are free to make such reasonable rules with reference thereto as they see fit; reasonable including the requirement that there be no discrimination in the accommodation.<sup>169</sup>

A statute of Oklahoma applying to intrastate travel, in so far as it gave equal, although separate accommodation to passengers, members of the white and negro races, was held valid by the Supreme Court, and in so far as it provided accommodations for whites not accorded to negroes, it was held to be invalid.<sup>170</sup>

167. *Plessy v. Ferguson*, 163 U. S. 537, 41 L. Ed. 256, 16 Sup. Ct. 1138.

168. *Chesapeake & O. Ry. Co. v. Kentucky*, 179 U. S. 388, 45 L. Ed. 244, 21 Sup. Ct. 101. See also *Edwards v. N. C. & St. L. Ry. Co.*, 12 I. C. C. 247; *Gaines v. Seaboard A. L. Ry. Co.*, 16 I. C. C. 471; *Cozart v. So. Ry. Co.*, 16 I. C. C. 226.

169. *Chiles v. Chesapeake & O.*

*R. Co.*, 218 U. S. 71, 54 L. Ed. 936, 30 Sup. Ct. 667; *Hall v. De Cuir*, *supra*, is cited in *Simpson, et al., R. R. Com. of Minnesota v. Shepard*, 230 U. S. 352, 432, 433, 57 L. Ed. 1511, 33 Sup. Ct. 729.

170. *McCabe v. A. T. & S. F. Ry. Co.*, 235 U. S. 151, 59 L. Ed. 169, 35 Sup. Ct. 69. See also *South Covington & C. St. Ry. Co. v. Kentucky* 252 U. S. 64 L. Ed. 40 Sup. Ct.

§ 30. **Posting Time of Trains.**—A statute of the state of Indiana requiring all railroads to “cause to be placed in a conspicuous place in each passenger depot of such company located at any station in this state at which there is a telegraph office, a blackboard at least three feet long and two feet wide, upon which such company or person shall cause to be written, at least twenty minutes before the schedule time for the arrival of each passenger train stopping upon such route at such station, the fact whether such train is on schedule time or not, and if late, how much,” and providing a penalty for violating the regulation, is within the legislative power. It is true that the regulation may apply to the time of an interstate train, but the matter is one of local concern, one upon which Congress has not acted, and one which does not directly affect interstate commerce.<sup>171</sup> If, however, the regulation is unreasonable, or is made by a commission without a finding of facts or evidence showing the relation between the receipts and the expense, it is void.<sup>172</sup>

§ 31. **Laws to Promote the Security and Comfort of Passengers.**—States may protect the personal security of those who are passengers on cars used within their limits. Under this principle a law of New York prescribing how passenger cars should be heated, was, in the absence of national regulation on the subject, valid. This was true, although the regulation incidentally affected interstate commerce.<sup>173</sup>

The statute requiring passenger cars to be heated, *supra*, was relied upon to sustain the Georgia statute requiring engines to be equipped with electric head lights. Since the Supreme Court sustained the New York law, *supra*, Congress has

171. *State v. Indiana & I. S. Ry. Co.*, 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502; *State v. Cleveland, C. C. & St. L. Ry. Co.*, 157 Ind. 288, 61 N. E. 669. Posting a tariff of rates would be governed by the same principles, *Johnson v. Seaboard A. L. Ry. Co.*, 78 S. C. 361, 52 S. E. 644.

172. *Kansas C. S. Ry. Co. v. State*, 27 Okla. 806, 117 Pac. 207;

*St. Louis & S. F. R. Co. v. Newell*, 25 Okla. 502, 106 Pac. 818.

173. *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. Ed. 853, 17 Sup. Ct. 418. In a note to the decision will be found cited a large number of cases sustaining the general principle involved in the statement of law in this section.

passed several statutes relating to safety appliances, and even though after the passage of these statutes the heating law might be sustained, it would seem that the electric headlight law, in so far as it applies to a locomotive engaged in interstate commerce, would be void.<sup>174</sup>

This contention was urged before the Supreme Court of the United States; but that court held that the Georgia statute was valid. In the course of the opinion reference was made to the different Federal Safety Appliance Acts, and it was stated that none of these acts referred to headlights, and said the court, "The intent to supersede the exercise of the state's police power with respect to this subject, can not be inferred from the restrictive action which thus far has been taken."<sup>175</sup> This appears a somewhat narrow view. Congress has prescribed certain regulations as to the equipment of railway locomotives used in interstate transportation. Presumably such regulations are all that in the opinion of Congress are necessary. The fact that Congress has not prescribed regulations for each part of the locomotive does not indicate that the "possession of the field" has not been taken. A state law should not lightly be set aside, and every presumption should be indulged in favor of its validity, but state regulations of the same instrumentality of commerce that has been regulated by Congress, although of a different part of such instrumentality, does invade the field already occupied by federal regulation, and in which, as has so frequently been said by the Supreme Court, the national authority is paramount and indivisible. The decision of the Supreme Court holding void the statute of the state of Indiana requiring grab-irons and hand-holds on cars, seems to accord with the text.<sup>176</sup>

The decision of the Supreme Court on the hand-hold law of Indiana indicates that with present Federal statutes such state

174. *Atlantic C. L. R. Co. v. State*, 135 Ga. 545, 69 S. E. 725, 32 L. R. A. (N. S.) 20, citing *people v. N. Y., etc., R. Co.*, 55 Hun. 409, 608 (8 N. Y. S. 673); *N. Y., etc., R. Co. v. New York*, 165 U. S. 628, 41 L. Ed. 853, 17 Sup. Ct. 418. See Safety Appliance laws, Appen-

dix, B *et seq.* and notes 112 and 123, *supra*.

175. *Atlantic C. L. R. Co. v. Georgia*, 234 U. S. 280. 58 L. Ed. 1312, 34 Sup. Ct. 829.

176. *So. Ry. Co. v. Railroad Com. of Ind.*, 236 U. S. 439, 59 L. Ed. 661, 35 Sup. Ct. 304.

laws are invalid. In all cases the state laws must not infringe the due process clause of the Constitution of the United States.<sup>177</sup>

§ 32. **Laws Limiting or Enlarging the Common Law Liability of Carriers.**—The question of the right of a railroad company to limit by contract its common law liability as a carrier is one of general law upon which the Supreme Court of the United States will exercise its judgment. It is none the less within the province of the states and any state may pass laws on the subject. Therefore, as to transportation within a state, the legislature of that state may provide that a contract of a common carrier by which it exempts itself from its common law liability is void.<sup>178</sup>

The statute of Virginia provides:

“When a common carrier accepts for transportation anything directed to a point of destination beyond his own line he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent.”

Suit was brought against the carrier issuing the bill of lading to recover for the loss of goods shipped from Virginia to Louisiana. The carrier depended on a clause in its bill of lading, not signed by the shipper, exempting it from liability for loss beyond its own line. The shipper relied on the statute, which statute was sustained by the Supreme Court.<sup>179</sup> Section twenty of the Act to Regulate Commerce, it will be remembered, contains a clause similar to the Virginia law, *supra*. *Post* sections 439, 440.

A law of Missouri similar to the Virginia law was also sustained by the Supreme Court of the United States.<sup>180</sup>

177. *Vandalia R. Co. v. Public Serv. Com. of Ind.*, 242 U. S. 255, 61 L. Ed. 276, 37 Sup. Ct. 93. See also note to Annotated Law Edition.

178. *Chicago, M. & St. P. Ry. Co. v. Solan*, 169 U. S. 133, 42 L.

Ed. 688, 18 Sup. Ct. 289. See notes L. Ed.

179. *Richmond & A. R. Co. v. Patterson*, 169 U. S. 311, 42 L. Ed. 759, 18 Sup. Ct. 335.

180. *Missouri, K. T. Ry. Co. v. McCann*, 174 U. S. 580, 43 L. Ed. 1093, 19 Sup. Ct. 755.

The refusal of a state court to hold valid a provision of a bill of lading limiting the carrier's liability to a stated sum does not violate any of the provisions of the interstate commerce act.<sup>181</sup>

A provision of the law of Georgia, applicable both to interstate and intrastate commerce, that a carrier, in order to exempt itself from liability beyond its own line, should inform the shipper, in writing, when, where and how and by which carrier the freight was lost or damaged was held invalid by the Supreme Court.<sup>182</sup> The Georgia case is distinguished from the Virginia case, note<sup>183</sup> *supra*, although the Virginia case required the carrier to show that the loss did not occur on its own line, when the shipper had signed a contract which limited the liability of the carrier to its own line. It would, therefore, seem that the Georgia law is just a little beyond the boundary line that marks the difference between a reasonable and an unreasonable regulation. In considering the Virginia case the court said:

"These views dispose of the substantial questions which the case presents, for the contention which arises on the concluding sentences of the statute, imposing upon a carrier a duty where the loss has not happened on the carrier's own line to inform the shipper of this fact, is but a regulation manifestly within the power of the state to adopt."

Subsequently to the decision of the Supreme Court of the United States, the Supreme Court of Georgia held that the Georgia statute applied only to intrastate commerce and so limited was valid.<sup>184</sup>

A law of Kansas requiring that weights be specified in bills of lading and that the weight so specified should be conclusive, was held not to violate the commerce clause of the Constitution of the United States, but to be void as denying due pro-

181. *Penn. R. Co. v. Hughes*, 191 U. S. 477, 48 L. Ed. 268, 24 Sup. Ct. 132.

182. *Cent. of Ga. R. Co. v. Murphey*, 196 U. S. 194, 49 L. Ed. 444, 25 Sup. Ct. 218, reversing same case, 116 Ga. 863, 43 S. E. 265, 60 L. R. A. 817.

183. *So. Ry. Co. v. Ragsdale*, 119 Ga. 773, 47 S. E. 179; *Davis v. Seaboard A. L. Ry. Co.*, 136 Ga. 278, 71 S. E. 419; *Seaboard A. L. Ry. Co. v. Davis*, 139 Ga. 547, 77 S. E. 795.

cess of law.<sup>184</sup> As to shipments in interstate commerce, such law would be void since the legislation extending the acts to regulate commerce.

While prior to the Hepburn Act a legislative prohibition of any contract in a bill of lading limiting the time in which to sue to less than two years was held valid as to an interstate shipment, such state law it is believed is now invalid when applied to interstate commerce.<sup>185</sup>

It is true that the so-called Carmack Amendment contained in the Hepburn Act, relates to limitations of liability and not limitations as to time in which to sue, but the subject of the contract for interstate shipments is included within the amendment, and it may well be argued that now Congress has taken possession of the field. The question has not been determined, but it would seem that an "interstate contract of shipment \* \* \* is withdrawn from the field of state law."<sup>186</sup>

The Cummins Amendments, as they were under the Act of August 9, 1916,<sup>187</sup> prescribed a minimum time for giving notice of loss or damage, for making claims and for filing suits. Statutes of a state in conflict with this statute are invalid. In this respect Transportation Act 1920, sections 439, 441, *post*, makes no change from the Cummins Amendments.

§ 33. **Same Subject—Liability to Employees.**—The first Employers' Liability Act, that of June 11, 1906, chap. 3073, 34 Stat. L. 232, was declared by the Supreme Court of the United

184. *Missouri, K. & T. Ry. Co. v. Simonson*, 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765, citing *Gulf, C. & S. F. Ry. Co. v. Dwyer*, 75 Tex. 572, 12 S. W. 1001, 7 L. R. A. 478.

185. *Reeves v. Tex. & P. R. C.*, — Tex. Civ. —, 32 S. W. 920; *Gulf, C. & S. F. Ry. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161; *Missouri, K. & T. Ry. Co. v. Withers*, 16 Tex. Civ. App. 506, 40 S. W. 1073.

186. *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. Ed. 690, 33 Sup. Ct. 397; *Kansas C.*

*S. R. Co. v. Carl*, 227 U. S. 639, 57 L. Ed. 683, 33 Sup. Ct. 391; *Chicago R. I. & P. R. Co. v. Cramer*, 232 U. S. 290, 58 L. Ed. 697, 34 Sup. Ct. 383, reversing same styled case, 153 Iowa 603, 133 N. W. 387. See Secs. 34 and 35, *post*.

187. Acts March 4, 1915, Chap. 176, 38 Stat. L. 1196; Aug. 9, 1916 Chap. 301, 39 Stat. L. 441; U. S. Comp. Stat. Vol. 8, Sec. 8604 a, *McCaull-Dinsmore Company v. C. M. & St. P. R. Co.*, 252 Fed. 664, Affirmed 260 Fed. 835; — C. C. A. —, 252 U. S. —, 64 L. Ed. —, 40 Sup. Ct. —.

States to be unconstitutional, because, as construed, it applied not only to employees of carriers engaged in interstate, but also to employees of carriers engaged in intrastate commerce. Whether the act violated the Fourteenth Amendment was not decided, but reference was made to decisions of the court holding valid state laws making a special regulation as to a carrier's liability to its employees.

Later, on April 22, 1908, the present Employers' Liability Act was approved and this act has been held valid by the Supreme Court.<sup>187</sup>

In the labor laws of the United States, contained in the twenty-second annual report of the Commission of Labor, will be found all the state laws similar to the Federal Employers' Liability Act up to the time that report was prepared. Since then other states have passed laws applying to intrastate commerce substantially the same as that contained in the Federal act. That the states may do this is clearly shown in *Howard v. Illinois Central R. Co.*, note<sup>188</sup> *supra*. That these state laws

188. Employers' Liability cases, *Howard v. Illinois C. R. Co.*, 207 U. S. 463, 52 L. Ed. 297, 28 Sup. Ct. 141. *Missouri P. R. Co. v. Mackay*, 127 U. S. 205, 32 L. Ed. 107, 8 Sup. Ct. 1161; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. Ed. 109, 8 Sup. Ct. 1176; *Chicago K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. Ed. 675, 15 Sup. Ct. 585. In *Missouri P. R. Co. v. Castle*, 224 U. S. 541, 56 L. Ed. 875, 32 Sup. Ct. 606, a State Employers' Liability Act passed prior to Act 1908 was held valid. See also *Tullis v. Lake E. R. Co.*, 175 U. S. 348, 44 L. Ed. 192, 20 Sup. Ct. 136; *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 54 L. Ed. 921, 30 Sup. Ct. 676; *Chicago, I. & L. Ry. Co. v. Kackett*, 228 U. S. 559, 57 L. Ed. 966, 33 Sup. Ct. 581, and cases cited; *Minnesota Rate Cases*, 230 U. S. 352, at pp. 408, 409, 57 L. Ed.

1511, 33 Sup. Ct. 729. *Mondou v. New York, N. H. & H. R. Co.* (Second Employers' Liability Cases), 223 U. S. 1, 56 L. Ed. prior to 1908 as to territories: *Gutierrez v. El Paso N. E. R. Co.*, 215 U. S. 87, 54 L. Ed. 106, 30 Sup. Ct. 21. State law regulating hours of labor of interstate railroad employees invalid. *Erie R. Co. v. New York*, 233 U. S. 671, 58 L. Ed. 1149, 34 Sup. Ct. 756, but same law requiring payment of wages semi-monthly is valid: *Erie R. Co. v. Williams*, 233 U. S. 685, 58 L. Ed. 1155, 34 Sup. Ct. 761. Repeal by state law of common law rule of nonliability for negligence of a fellow servant valid whether the business affected "is connected with interstate commerce or not". *Swayne & Hoyt v. Barsch*, 226 Fed. 581, 141 C. C. A. 337. For a list 327, 32 Sup. Ct. 169, 38 L. R. A. (N. S.) 44. Act, 1906, *supra*, valid

are valid can, therefore, be safely assumed. It is always a question of fact, in each case, as to whether or not the commerce at the time an injury may occur is within the one or the other law. Questions of jurisdiction will also be determined upon the facts in each case. It tends, therefore, to harmony that the states are adopting the Federal statute. The same carrier should not, in performing the same kind of service, be subjected to conflicting laws, merely because in one case the injury is caused by a car or train engaged in interstate commerce is subject to regulation by the Federal government but. state commerce. In most cases, however, it will be found that the carrier is engaged in transporting interstate commerce. The act of Congress applies only to common carriers while engaged in interstate commerce and to employees while employed by such carriers in such commerce.<sup>189</sup>

**§ 34. Same Subject—Liability for Loss or Damage to Shipments.**—The carrier's contract to transport in interstate commerce is subject to regulation by the Federal government but, in the absence of Congressional action, may be regulated by the states.<sup>190</sup> Judge Powell, of the Court of Appeals of Georgia, in an opinion quoted by the Supreme Court of the United States, described the condition in apt language, as follows:<sup>191</sup>

"Some states allowed carriers to exempt themselves from all or a part of the common law liability, by rule, regulation, or contract; others did not; the federal courts sitting in the various states were following the local rule, a carrier being held liable in one court when under the same state of facts he would be exempt from liability in another; hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in a business that extended be-

of cases arising under Federal Liability Act, see briefs in *Sou. Ry. Co. v. Puckett* 244 U. S. 571, 61 L. Ed. 1321, 37 Sup. Ct. 703.

189. Appendix K; Sec. 332, *post* discusses the scope of the federal statute.

190. *Penn. R. Co. v. Hughes*, 191 U. S. 477, 48 L. Ed. 268, 24 Sup. Ct. 132.

191. *So. Pac. Co. v. Crenshaw*, 5 Ga. App. 675, 687, 63 S. E. 865, quoted: *Adams Ex. Co. v. Croninger*, 226 U. S. 491, 505, 57 L. Ed. 314, 33 Sup. Ct. 148.

yond the confines of his own state, or for a carrier whose lines were extensive, to know without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one state to another."

To meet this situation Congress enacted what was called the Carmack Amendment,<sup>192</sup> which superseded all the regulations and policies of the states in so far as they related to interstate commerce. There is, however, a transportation which applies between points both within a state and which can be reached without going out of the state. As to such transportation Congress has not assumed to act, and contracts relating thereto are subject to state laws and regulations.<sup>193</sup> Therefore, states may legislate and the state commissions may make regulations relating to a carrier's liability on a contract of shipment in intrastate commerce.

The Carmack Amendment being a valid law within the power of Congress to enact, the states can no longer legislate concerning the liability of carriers under interstate contracts of shipment.<sup>194</sup>

192. See Amendment, changed somewhat by Transportation Act 1920, Secs. 439, 440, *post*. Prior to a decision by the Supreme Court the state courts disagreed as to the construction of this amendment. See *Post v. Atlantic C. L. R. Co.*, 138 Ga. 763, 76 S. E. 45, citing cases as follows: "On this subject there are two lines of authority. See *Adams Ex. Co. v. Mellichamp*, 138 Ga. 443, 75 S. E. 596; *Hooker v. Boston & M. R. Co.*, 209 Mass. 598, 95 N. E. 945, 23 Ann. Cas. 699, and note; *Travis v. Wells, Fargo & Co.*, 79 N. J. L. 83, 74 Atl. 444; *Greenwald v. Weir*, 130 N. Y. App. Div. 696, 115 N. Y. Supp. 311; In the matter of *Released Rates*, 13 I. C. C. 550, 552; *Watkins on Shippers and Carriers*, 1st. Ed., 267, Sec. 201; *Galveston, etc., R. Co. v. Wallace*,

223 U. S. 481, 491-2, 56 L. Ed. 516, 32 Sup. Ct. 205; *St. Louis, etc., R. Co. v. Grayson*, 89 Ark. 154, 115 S. W. 933.

193. *Simpson, et al, R. R. Com. of Minnesota v. Shepard*, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729; See also *Yazoo & M. V. R. Co. v. Jackson Vinegar Co.*, 226 U. S. 217, 57 L. Ed. 193, 33 Sup. Ct. 40; *Johnson v. So. Ry. Co.*, 69 S. C. 322, 48 S. E. 260.

194. *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. Ed. 808, 34 Sup. Ct. 526, reversing *contra* styled case, 209 Mass. 598, 95 N. E. 945, Ann. Cas. 1912B 669; *Atchison T. & S. F. R. Co. v. Robinson*, 233 U. S. 173, 58 L. Ed. 90, 34 Sup. Ct. 556, reversing same styled case, 36 Okla. 435, 129 Pac. 20; *Charleston C. R. Co. v. Varnville Furniture Co.*, 237

But the rights of the states to legislate concerning intrastate commerce remains unaffected.<sup>195</sup>

§ 34a. **Same Subject—Cummins Amendments.**—Congress by what is usually called the first Cummins Amendment<sup>196</sup> sought further to lessen the exceptions from liability for which the carrier might contract. The Interstate Commerce Commission<sup>197</sup> in construing this amendment said: "The right of the carrier to initiate its rates and to consider value of the property tendered for transportation as an element in determining the classification thereof, or the rate applicable thereto has not been denied by the Act or withdrawn by this amendment." So while the liability of the carriers was increased there was a consequent and probably a commensurate increase in the charges. To prevent increases in rates on ordinary livestock and to avoid the annoyances which passengers had been subjected to with reference to their baggage, Congress passed what has come to be called the Second Cummins Amendment.<sup>198</sup> The Carmack and the two Cummins Amendments, in this respect not changed by Transportation Act 1920, deprive the states of power to regulate a carrier's liability for interstate shipments,<sup>199</sup> and leave such liability to be determined by the Federal law. The effect of the amendments is to protect shippers and give a right of recovery "for full actual loss" of goods "at the point of destination at the time they should have

U. S. 597, 59 L. Ed. 1137, 35 Sup. Ct. 715, reversing same styled case, 98 S. C. 63, 79 S. E. 700; *American Brake Shoe & Foundry Co. v. Pere Marquette R. Co.*, 223 Fed. 1018.

195. *Atlantic C. L. R. Co. v. Glenn*, 239 U. S. 388, 60 L. Ed. 344, 36 Fed. Ct. 154.

196. Secs. 439, 440, *post*; The Cummins Amendment 33 I. C. C. 682.

197. The Cummins Amendment 33 I. C. C. 682, 694.

198. Sec. 440 *post*. Express Rates and Practices 43 I. C. C. 510; Live stock classifications, 47 I. C. C. 335; *Williams Co. v. H. C.*

& N. Y. T. Co., 48 I. C. C. 269; *Silk Assn. of Am. v. P. R. R. Co.* 44 I. C. C. 578; 50 I. C. C. 50

199. The need for statutes protecting shippers from unjust contracts of common carriers is made apparent by an examination of recent decisions of the Supreme Court: *Southern Pac. Co. v. Stewart*, 248 U. S. 446, 63 L. Ed. —, 39 Sup. Ct. —; *Baltimore & O. R. Co. v. Leach*, 249 U. S. 217, 63 L. Ed. —, 39 Sup. Ct. —; *Erie R. Co. v. Stewart*, 250 U. S. —, 63 L. Ed. —, 39 Sup. Ct. and cases cited in the opinions.

been delivered."<sup>200</sup> The 1920 amendment changes the limitations of time for filing suits but otherwise substantially follows the Cummins Amendment of 1916.<sup>201</sup> No power of the states over contracts of interstate transportation exists since the Carmack, Cummins and 1920 amendments and Congress by the Bill of Lading Law has further extended its occupancy of this field.<sup>202</sup>

§ 35. **Penalties for Failure to Pay Claims.**—A law of South Carolina provided that should a carrier fail, within a time therein stated, to pay a claim for loss or damage, such carrier was subject to a penalty of fifty dollars. The law applied both to intrastate and interstate commerce, the time to settle being forty days in the former and ninety days in the latter. In a case in the Supreme Court of the United States involving an intrastate shipment where judgment had been entered for fifty dollars penalty and one dollar and seventy-five cents damages, the law was sustained.<sup>203</sup> Mr. Justice Brewer, delivering the opinion, said:

"Further, the matter to be adjusted is one peculiarly within the knowledge of the carrier. It receives the goods and has them in its custody until the carriage is completed. It knows what injury was done during the shipment, and how it was done. The consignee may not know what was in fact delivered at the time of the shipment, and the shipper may not know

200. *McCaull-Dinsmore Co. v. Chicago M. & St. P. Ry. Co.* 252 Fed. 664, affirmed 260 Fed. 835, — C. C. A. —; *Decker v. M. & St. P. R. Co.* 55 I. C. C. 453.

201. Sec. 440, *post*.

202. Bills of Lading Act, Sec. 440a, to 440rr *post*. *United States v. Ferger*, 250 U. S. —, 63 L. Ed. —, 39 Sup. Ct. —. Bills of Lading, 52 I. C. C. 675. *Decker* case note 200, *supra*.

203. *Seaboard A. L. Ry. Co. v. Seegers*, 207 U. S. 73, 52 L. Ed. 108, 28 Sup. Ct. 28. Same case below, 73 S. C. 71, 52 S. E. 797. See also *Best v. Seaboard A. L. Ry. Co.*, 72

S. C. 479, 52 S. E. 223; *Yazoo & M. V. V. R. Co. v. Jackson Vinegar Co.*, 226 U. S. 217, 57 L. Ed. 193, 33 Sup. Ct. 40; *So. Ry. Co. v. Love*, 139 Ga. 362, 77 S. E. 44; *Kansas C. S. Ry. Co. v. Anderson*, 233 U. S. 825, 58 L. Ed. 993, 34 Sup. Ct. 599, affirming same styled case, 104 Ark. 500, 148 S. W. 58; *Missouri K. & T. R. Co. v. Cade*, 233 U. S. 642, 58 L. Ed. 113, 34 Sup. Ct. 678, following *Missouri K. & T. R. Co. v. Mahaffey*, 105 Tex. 394, 150 S. W. 881, and explaining *Gulf C. & S. F. R. Co. v. Dennis*, 224 U. S. 503, 56 L. Ed. 860, 32 Sup. Ct. 542.

what was delivered to the consignee at the close of the transportation. The carrier can determine the amount of the loss more accurately and promptly and with less delay and expense than any one else, and for the adjustment of loss or damage to shipments within the state forty days can not be said to be an unreasonably short length of time."

The same statute was held valid when applied to an interstate shipment. The Supreme Court of South Carolina, discussing the statute thus sought to be applied, said:"

"The penalty imposed is for a delict of duty appertaining to the business of a common carrier, and in so far as it may affect interstate commerce, it is an aid thereto by its tendency to promote safe and prompt delivery of goods, or its legal equivalent—prompt settlement of proper claim for damages. No penalty can attach except upon the establishment in a court of a default of duty imposed by statute."

The Supreme Court of the United States quoted the language just copied in the opinion holding that the state statute was valid.

Such statutes when unreasonable are void, whether affecting interstate commerce or not, and so held of an Arkansas statute providing for heavy penalties, when the shipper recovered the amount for which he sued, although previous to his suit he had demanded a larger amount."

In a case involving the validity of a Texas statute providing for attorneys' fees where judgments were rendered for loss of or damage to freight, it was urged that such statute affected interstate commerce, and was void because of conflict with the Carmack Amendment. This contention the Supreme Court

204. *Atlantic C. L. R. Co. v. Mazursky*, 216 U. S. 122, 132, 54 L. Ed. 411, 30 Sup. Ct. 378, affirming same styled case, 78 S. C. 36, 58 S. E. 927, 125 Am. St. Rep. 762. See discussion and cases cited *Dickinson v. Stile*, 246 U. S. 631, 62 L. Ed. 908, 911, 38 Sup. Ct. 415.

205. *St. Louis, I. M. & S. Ry. Co. v. Wynne*, 224 U. S. 354, 56 L. Ed. 799, 32 Sup. Ct. 493. Followed in *Chicago M. St. P. Ry. Co. v. Polt*,

232 U. S. 165, 58 L. Ed. 554, 34 Sup. Ct. 301, reversing same styled case, 26 S. D. 378, 128 N. W. 472; *Chicago M. & St. P. Ry. Co. v. Kennedy*, 232 U. S. 626, 58 L. Ed. 762, 34 Sup. Ct. 463, reversing same styled case, 28 S. D. 94, 132 N. W. 802. *Missouri K. & T. R. Co. v. Tucker*, 230 U. S. 340, 57 L. Ed. 1507, 33 Sup. Ct. 961, reversing *Tucker v. Mo. Kan. & Tex. R. Co.*, 82 Kan. 222, 108 Pac. 89.

met by saying: "But the Texas statute now under consideration does not in any way either enlarge or limit the responsibility of the carrier for the loss of property intrusted to it in transportation, and only indirectly affects the remedy for enforcing that responsibility."<sup>206</sup>

Congress has dealt with the contract in the Carmack Amendment. These penalty statutes, as stated by the Supreme Court, do not affect the contract but refer to the remedy for a breach thereof.<sup>207</sup>

This distinction must not be overlooked. In the Texas case *supra*, the loss for which suit was brought occurred on the line of the delivering carrier, and other than this presumption there was no evidence to show which of the carriers transporting the commodity caused the damage thereto. The Carmack Amendment gives a right of action against the initial carrier. So a later South Carolina judgment was reversed,<sup>208</sup> not because of the provision for the recovery of an attorney's fee, but because the right to recover both damages and attorney's fees was based upon a statute in conflict with the Federal law. With this distinction in mind, the later South Carolina case is in harmony with the decision in the Texas case. In the South Carolina case, the Texas case and other cases are cited and the applicable principle stated as follows:<sup>209</sup> "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."

**§ 36. Requiring Railroads to Perform Transportation Service.**—It is axiomatic that a common carrier is not at liberty to accept or decline shipments or to accept or decline the duty of transporting passengers. Reasonable rules as to the time, place and manner of receiving freight and passengers may

206. *Missouri K. & T. R. Co. v. Harris*, 234 U. S. 412, 58 L. Ed. 1377, 34 Sup. Ct. 790, and see cases cited affecting the question arising on state legislation and question arising under the Carmack Amendment.

207. Sec. 32 *ante*.

208. *Charleston & W. C. Ry. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 59 L. Ed. 1137, 35 Sup. Ct. 715.

be made by the carrier, but these are subject to the governmental power of regulation. The regulation of interstate transportation in this respect is for Congress, but the states have jurisdiction over intrastate transportation of persons and property. These principles were stated by Mr. Justice Brewer, as follows:<sup>209</sup>

"The question we have to consider is the power of the state to enforce an equality of local rates as between all parties shipping for the same distance over the same road. That a state has such power can not be doubted, and it can not be thwarted by any action of a railroad company which does not involve an actual interstate shipment, although done with a view of promoting the business interests of the company. Even if a state may not compel a railroad company to do business at a loss and conceding that a railroad company may insist, as against the power of the state, upon the right to establish such rates as will afford reasonable compensation for the services rendered, yet when it voluntarily establishes local rates for some shippers it can not resist the power of the state to enforce the same rates for all."

Mr. Justice Hill, of the Supreme Court of Georgia, in holding valid a statute of that state preventing discrimination in the sale of passenger tickets by connecting carriers, showed how ancient is this right to regulate. He said:<sup>210</sup>

"The principle of the right of a state or government to regulate carriers and rates for public services performed is not new, but seems to date back to a very ancient period. So far as the writer's research extends, it goes at least as far back as 2250 years before the birth of Christ, to the reign of Hammurabi, the King of ancient Babylon, who had a complete code of laws for that time. Indeed, our laws of the present day have few underlying principles that do not seem to be contained in this primitive code."

**§ 37. Sale and Regulation of Passenger Tickets.**—The contract or ticket for transportation of a person over a railroad

209. *Ala. & V. R. Co. v. Mississippi R. R. Com.*, 203 U. S. 406, 501, 51 L. Ed. 289, 27 Sup. Ct. 163, affirming same styled case, 86 Miss. 667, 38 So. 356.

210. *Stephens v. Cent. of Ga. Ry. Co.*, 138 Ga. 625, 628, 629, 75 S. E. 1041, 42 L. R. A. (N. S.) 541, 1913E, Ann. Cas. 609.

is subject, like the rate, to reasonable regulation. The power to regulate rests, as to travel among the states and with foreign countries, with the Federal government; and as to travel in one state, with the state government. As to those contracts within their regulating power, the states may make all reasonable rules. What is a reasonable rule must depend upon the facts of each case. It is not unreasonable to require the carrier to redeem tickets or unused portions thereof.<sup>211</sup> Nor is a law which requires that tickets may not be sold except by authorized agents of the carrier unreasonable, and such a law applying to the acts of agents within a state has no direct effect on interstate commerce although the ticket sold may be a contract authorizing the purchaser to travel from one state to another. Congress has not, as yet, attempted to regulate relating to this subject.

Referring to a statute limiting the right to sell tickets to agents of the carrier, the Supreme Court of Illinois, in deciding that the statute referred to all tickets, accurately stated the reasons why interstate commerce was not interfered with as follows:<sup>212</sup>

211. *Missouri, K. & T. Ry. Co. v. Fookes*, — Tex. Civ. App. —, 40 S. W. 858. And carriers may legally require the purchase of a ticket and in default charge a higher rate, *Coyle v. So. Ry. Co.*, 112 Ga. 121, 37 S. E. 163.

212. *Burdick v. People*, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, 41 Am. St. Rep. 329. To same effect. *State v. Corbett*, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498; *State v. Thompson*, 47 Oreg. 639, 84 Pac. 476, 4 L. R. A. (N. S.) 480; *Commonwealth v. Keary*, 198 Pa. St. 500, 48 Atl. 472. As to the validity of such legislation as to state transportation, see *Samuelson v. State*, 116 Tenn. 470, 95 S. W. 1012, 115 Am. St. Rep. 805; *Fry v. State*, 63 Ind. 552; *Jannen v. State*, 42 Tex. Cr. App. 631, 51 S. W. 1126, 62 S. W. 419

(right to regulate sustained); *State v. Bernheim*, 19 Mont. 512, 49 Pac. 441; *Ex Parte O'Neil*, 83 Pac. 104. The legislatures of many states have appreciated the unlawful and fraudulent character of the ticket scalpers' business, and statutes have been enacted making dealing in these tickets by others than an authorized agent of the carrier a violation of the criminal law, viz: Pennsylvania, New Jersey, Illinois, Indiana, Minnesota, Georgia, Maine, Texas, North Carolina, Tennessee, North Dakota, Oregon, Montana, Florida and New York, "Laws of New York, 1901, c. 639, prohibiting private individuals from selling railroad tickets, and forbidding the officers of a common carrier from supplying tickets for sale to any other than an authorized

"State legislation, which is not an obstacle to interstate commerce, and imposes no burden upon it, and which comes within a proper exercise of the police power, is not unconstitutional, as infringing upon the powers of Congress. The Act of 1875 is, we think, such a species of state legislation. The duties which it imposes upon the carriers therein named, and their agents can not interfere with the freedom of interstate travel. Such travel is not impeded because tickets are required to be purchased from agents of the carrier who are provided with certificates of their authority. The limitation of the sale of tickets to such agents may be a restraint upon the business of scalpers and ticket brokers, but can not be regarded as a burden upon interstate commerce."

The contract of interstate transportation can not be controlled by a state and a state law making an interstate ticket binding for six years and giving stop-over privileges, no such provision being in the contract, is void,"<sup>213</sup> and so is a law requiring carriers to give shippers of live stock free transportation in interstate commerce."<sup>214</sup> A state, as to intrastate travel, may require carriers who have voluntarily issued commutation tickets to designate specifically both termini of such tickets."<sup>215</sup> This rule of law has support in the principle that

agent, has been declared by the New York Court of Appeals not a valid exercise of the power of the legislature to regulate the conduct of a railroad company's business because it is a creation of the legislature and a common carrier." *People v. Caldwell*, 71 N. Y. Supp. 654, 64 App. Div. 46, *Musco v. United Surety Co.*, 132 App. Div. 300, 117 N. Y. Supp. 21, affirmed 196 N. Y. 459, 90 N. E. 171. Such a regulation was held invalid by the Court of Appeals of New York in *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 54 N. E. 1006, 43 L. R. A. 264, 68 Am. St. Rep. 763, reversing the same case in 26 App. Div. 226, 50 N. Y. Supp. 56. The reversal

was placed upon the contention that the statute violated the citizens' liberty to contract, and not upon the commerce clause of the federal constitution. The New York court is not in accord with the general and better rule announced in the cases *supra*.

213. *Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 689; *Louisville & N. R. Co. v. Bitterman*, 144 Fed. 34, 75 C. C. A. 192, affirmed by Supreme Court, *Bitterman v. Louisville & N. R. Co.*, 207 U. S. 205, 52 L. Ed. 171, 28 Sup. Ct. 91.

214. *La Farier v. Grand Trunk Ry. of Canada*, 84 Me. 284, 286, 24 Atl. 848.

215. *Deleware, L. & W. R. Co. v. Public Utility Comr's*, 84 N. J. 619,

although a special rate or privilege may not be compelled, if it should be voluntarily granted by the carrier, the privilege while existing is so far subject to regulation as to prevent discrimination;<sup>216</sup> but the carrier may change its policy and withdraw the privilege.<sup>217</sup>

§ 38. **Same Subject—Mileage Books—Party Rate Tickets.—**

It has become a general practice for railroads to sell mileage books which entitle passengers complying with the terms stated therein to transportation at a rate less than the rate where a single ticket is purchased. By a mileage ticket, one person gets a number of rides at less than the usual fare, by a party rate ticket a number of persons get one ride each at less for each one than would be the rate if each bought a single ticket. The Supreme Court has held that party rate tickets open to all are not discriminatory under the Act to Regulate Commerce;<sup>218</sup> and in the same case it was held that a party rate ticket was neither a mileage nor a commutation ticket. Section 22 of the Act to Regulate Commerce provides: "That nothing in this Act shall prevent \* \* \* the issuance of mileage, excursion or commutation passenger tickets."<sup>219</sup> This provision indicates that there was a necessity therefor to prevent such a construction of the Act as would prohibit the issuance of these special contracts.

No room is left, if there ever were such, for the states to regulate or require the issuance of mileage tickets for interstate transportation. The Interstate Commerce Commission has held that, as to interstate transportation of passengers, "the issuance of mileage books is voluntary," but if they are issued there must be no discrimination, although the carrier may "attach to the contract such lawful conditions as it chooses."<sup>220</sup>

87 Atl. 801. For a discussion of a related subject see Rules and Regulations Governing Checking of Baggage, 35 I. C. C. 157.

216. *Alabama & V. Ry. Co. v. R. R. Com. of Miss.*, 203 U. S. 496, 51 L. Ed. 298, 27 Sup. Ct. 163, affirming same styled case, 86 Miss. 667, 38 So. 356.

217. *Cent. of Ga. Ry. Co. v. Augusta Brokerage Co.*, 122 Ga. 646, 50 S. E. 473, 69 L. R. A. 119.

218. *Baltimore & O. R. Co. v. Int. Com. Com.*, 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844.

219. Sec. 444, *post*.

220. *Eschner v. Penn. R. Co.*, 18 I. C. C. 60, 63, 64; *Re Prac-*

It is believed that the states may not require the issuance of these contracts and may not prescribe the terms thereof further than to prevent discrimination in their issuance and use. In 1891 the state of Michigan attempted to compel the sale by carriers of mileage books under certain prescribed conditions and, the state court having sustained the statute limiting its operation to intrastate commerce,<sup>221</sup> the question was presented to the Supreme Court of the United States by writ of error to the state court. The questions raised in the Supreme Court, as stated in its opinion, were: "(1) whether the act violates the Constitution of the United States by impairing the obligation of any contract between the state and the railroad company; (2) if not, does it nevertheless violate the Fourteenth Amendment of the Constitution by depriving the company of its property or liberty without due process of law or by depriving it of the equal protection of the laws." Of these contentions the court, in holding the Michigan statute void,<sup>222</sup> said:

"In this case there is not an exercise of the power to fix maximum rates. There is not the exercise of the acknowledged power to legislate so as to prevent extortion or unreasonable or illegal exactions. The fixing of the maximum rate does that. It is a pure, bald and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road and permitting them to do so at a less expense than others, provided they buy a certain number of tickets at one time. It is not legislation for the safety, health or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of, who in the legislative judgment should be carried at a less expense than the other members of elaborate opinion the Supreme Court of Georgia has held the community."

This decision would appear to be conclusive, although in an valid a regulation of the Railroad Commission of Georgia requiring railroads, as to intrastate transportation from cities

tices Governing Sale and Exchange of Mileage Books, 28 I. C. C. 318, and cases cited. Rules and Regulations Governing Checking of Baggage, 35 I. C. C. 157, 160.

221. *Lake S. & M. S. Ry. Co. v. Smith*, 114 Mich. 460, 72 N. W. 328.

222. *Lake S. & M. S. Ry. Co. v. Smith*, 173 U. S. 684, 698, 43 L. Ed. 858, 19 Sup. Ct. 565.

of a designated size, to honor mileage books on their trains and prohibiting the requirement in the contract that mileage shall be exchanged for a ticket."<sup>223</sup>

§ 39. **Free Transportation.**—As to interstate transportation, Congress has so legislated as to prevent free transportation except as to certain designated persons and classes."<sup>224</sup> One

223. *Louisville & N. R. Co. v. R. R. Com. of Georgia*, 140 Ga. 817, 80 S. E. 327, Ann. Cas. 1915A, 1018, As sustaining the Georgia court see *Delaware, L. & W. R. Co. v. Board of Public Utility Comr's*, 84 N. J. L. Vroom 619, 87 Atl. 801. See *Beardsley v. New York L. E. & W. R. Co.* 162 N. Y. 232, 56 N. E. 488, holding that a statute requiring the issuance of mileage books was void and reversing same styled case, 17 Misc. Rep. 256, 40 N. Y. Supp. 1077, 15 App. Div. 251, 44 N. Y. Supp. 175. In *Attorney General v. Old Colony R. Co.*, 160 Mass. 62, 35 N. E. 252, 22 L. R. A. 112, it was held that a similar statute was void, the court saying: "The objection that the statute authorizes one railroad to make conditions concerning the transportation of passengers which must be performed by other railroads seems to us valid. The objection is not that the legislature has itself attempted to declare the rights of passengers who have purchased mileage tickets. The legislature, by this statute, has not determined the conditions which shall be incident to the carriage of passengers under these tickets; nor has it left them to be determined by the railroad company transporting the passengers. One railroad is, in effect, authorized to make a contract for an-

other, but the railroads are not in fact the agents of each other in issuing these tickets. It has been often said that the legislature can not make a contract between two or more persons which they do not choose to make, although it may sometimes impose duties which can be enforced as if they arose from contract. Without denying the power of the legislature to determine the form of the contracts which common carriers of persons or merchandise must make concerning transportation, and without considering the authority of the legislature to delegate this power to a board of public officers, we are of the opinion that this power can not be delegated to private persons or corporations." While the Supreme Court of Georgia has held that it could regulate the use of mileage books, the principles announced by the same court in other cases would permit the withdrawal by the carriers of such special contracts. See *Central or Ga. Ry. Co. v. Augusta Brokerage Co.*, 122 Ga. 646, 50 S. E. 473, 69 L. R. A. 119; *Southern Ry. Co. v. Atlanta Stove Works*, 128 Ga. 207, 57 S. E. 429. For a discussion of the general question, see *Chicago R. I. & P. Ry. Co. v. Ketchum*, 212 Fed. 986.

224. Secs. 182, 342, 442, *post*, and annotations.

purpose of governmental regulation of common carriers, if not the chief and most beneficent, is the prevention of favoritism, and that such purpose may be accomplished, states may, within the scope of the commerce subject to their regulation, prevent common carriers from discriminating by giving free transportation of persons or of property. Exceptions to the general rule may lawfully be made in favor of certain public or charitable purposes, and carriers may interchange transportation service."<sup>225</sup>

A state may not require free transportation to shippers of cattle in interstate commerce."<sup>226</sup>

A state statute authorizing state incorporated railroads to issue transportation in payment for printing and advertising is void as to interstate transportation."<sup>227</sup>

§ 40. **Routing Freight.**—The Railroad Commission of Arkansas passed this regulation: "In case of failure on the part of the shipper to give routing instructions, it shall be the duty of the railroad receiving the shipment to forward it via such route as will make the lowest rate."

As Congress has the exclusive, undivided and plenary power to regulate interstate commerce, such a rule as to that commerce is void, although as to an intrastate haul it would be reasonable and valid."<sup>228</sup>

225. *State v. Martyn*, 82 Neb. 225, 117 N. W. 719; *Schulz v. Parker*, 158 Iowa 42, 139 N. W. 173. Exchange of transportation for newspaper advertising violates Anti-Pass law. *State v. Union Pac. R. Co.*, 87 Neb. 29, 126 N. W. 859. A valid contract for a pass not abrogated by Anti-Pass statute subsequently enacted, *Emerson v. Boston & M. R. Co.*, 75 N. H. 427, 75 Atl. 529; but *contra* as to federal statute, *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. Ed. 297, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671. States may not compel free transportation to officials, *Delaware, L. & W. R. Co. v. Public Utility Com'rs*, 55 N. J. L. 28, 88

Atl. 849. Free transportation violates statute against discrimination, *State v. Southern Ry. Co.*, 122 N. C. 1052, 30 S. E. 133, 41 L. R. A. 246. Purpose of Act to regulate commerce stated: Rates for Transportation of Anthracite Coal, 35 I. C. C. 220, 289.

226. *State v. Otis*, 60 Kan. 248, 56 Pac. 14. See note, 214, *supra*.

227. *Chicago, I. & L. R. Co. v. United States*, 219 U. S. 486, 55 L. Ed. 305, 31 Sup. Ct. 272, affirming *United States v. Chicago, I. & L. R. Co.*, 163 Fed. 114. See also *Louisville & N. R. Co. v. Mottley*, 211 U. S. 149, 53 L. Ed. 126, 29 Sup. Ct. 42.

228. *St. Louis & S. F. R. Co. v.*

**§ 41. When Interstate Transportation Begins and Ends.—**

In determining the question as to the validity of a particular regulation made by the Federal or state governments, it is necessary to decide whether the transportation affected by the regulation is interstate or intrastate transportation. If the transportation is to be interstate it is subject to Federal regulation and excluded from state regulation from the time it begins. It makes no difference that the particular service sought to be regulated is performed wholly in one state if the transportation is interstate. In *Coe v. Errol*,<sup>229</sup> the Supreme Court stated negatively when the interstate transportation began by saying it did not begin until the goods "have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey." In another part of the opinion it was said that goods are in interstate commerce when they have "actually started in the course of transportation to another state, or delivered to a carrier for transportation."

In *Covington Stock Yards Co. v. Keith*,<sup>230</sup> the rule as to both the beginning and ending of the transportation was stated as follows: "The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee."

Freight tendered for through transportation is within the regulating power of the Federal government, although a bill of lading can not be issued until the agent learns from his superiors the legal rate.<sup>231</sup>

Allen, 181 Fed. 810; *Porter v. St. Louis & S. F. R. Co.*, 78 Ark. 182, 95 S. W. 953. For other cases see Dec. Dig., Key No. Title Commerce, Secs. 8 and 61.

229. *Coe v. Errol*, 116 U. S. 517, 527, 29 L. Ed. 715; 6 Sup. Ct. 475, followed, *Sou. Pac. Terminal Co. v. Interstate Com. Com.*, 219 U. S. 498, 527, 55 L. Ed. 310, 31 Sup. Ct. 279; and *Ill. C. R. Co. v. Louisiana R. R. Com.*, 236 U. S.

157, 59 L. Ed. 517, 35 Sup. Ct. Rep. 275.

230. *Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 136, 35 L. Ed. 73, 11 Sup. Ct. 416, quoted and followed, *United States v. Union Stock Yard & Transit Co.*, 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83.

231. *Southern Ry. Co. v. Burlington Lumber Co.*, 225 U. S. 99,

A car containing interstate shipments is, prior to reaching its destination, engaged in interstate commerce, although stopped for repairs.<sup>232</sup> When, however, the transportation contract has been completed, the fact that such completed contract was one of interstate transportation will not make a subsequent shipment of the same goods to a point in the same state one of interstate transportation.<sup>233</sup>

Goods stored for more than two months under a provision of an interstate tariff permitting storage in transit retain the character of an interstate shipment.<sup>234</sup> So a reshipment of a car that had moved in interstate commerce from one to another point in a state under a reconsignment right is an interstate shipment.<sup>235</sup> In discussing the Child Labor Law the Supreme Court said: "The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce make their production a part thereof."<sup>236</sup> Applying this principle, the mere intention ultimately to continue a movement that is intrastate to a point beyond the state does not constitute the first and independent movement an interstate shipment.<sup>237</sup>

56 L. Ed. 1001, 32 Sup. Ct. 657; and cases cited.

232. *Delk v. St. Louis & S. F. R. Co.*, 220 U. S. 580, 55 L. Ed. 590, 31 Sup. Ct. 617.

233. *Gulf, C. & S. F. Ry. Co. v. Texas* 204 U. S. 403, 51 L. Ed. 540, 27 Sup. Ct. 360, cited and distinguished in *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, *supra*; *Chicago M. & St. P. Ry. v. Iowa*, 233 U. S. 334, 58 L. Ed. 988, 34 Sup. Ct. 592.

234. *Western Transit Co. v. Leslie & Co.*, 242 U. S. 448, 61 L. Ed. 423, 37 Sup. Ct. 133.

235. *A. T. & S. F. Ry. Co. v. Harold*, 241 U. S. 371, 60 L. Ed. 1050, 36 Sup. Ct. 665. "The real and ultimate destination of the shipment" controls. *United States*

*v. Philadelphia & R. Ry. Co.* 232 Fed. 946.

236. *Hammer v. Dagenhart* 247 U. S. 251, 62 L. Ed. 1101, 38 Sup. Ct. 529 and cases cited in the opinion. Abstractly the principle quoted is a correct one, but while the question is not here important, it is believed that the Supreme Court should have applied to the law under discussion the principle that Congress may keep the field of interstate commerce free from any act that will handicap any one wishing to cultivate that field. For a discussion of the Child Labor Law by the author hereof, see *Case & Comment* Vol. 23, No. 11, April 1917, pp 906.

237. *Arkadelphia Mill Co. v. St. L. S. W. R. Co.* 249 U. S. 134, 63 L. Ed. —, 39 Sup. Ct. 237, P. U.

A shipment intended for a point in another state can not be billed to a point in the state in which the shipment originated and then rebilled to the destination point on the sum of the intermediate local rates. The through interstate rate must be applied. In discussing this question the Interstate Commerce Commission said:\*\*\* "This commission, as hereinbefore stated, has steadfastly adhered to the proposition that on any through carriage of traffic between interstate points the lawfully published interstate rate must be applied by the carrier and paid by the shipper, and that where the through interstate rate in effect between two points is higher than the aggregate of the intermediate rates any plan of first billing to an intermediate point a shipment that is really intended to reach a destination beyond is simply a device for defeating the lawful through rate, and is unlawful."

§ 42. **Attachments and Garnishments.**—Interstate carriers must of necessity interchange cars, and from this interchange of cars and from the transaction of through business credits arise in favor of one carrier against another. Whether or not these cars and credits belonging to a railroad of another state may be reached by process of attachment and garnishment was a mooted question in the state courts. Where a railroad company of a state received the cars of a railroad company of another state under a contract by which the domestic company had the right to carry the loaded car to its destination and to reload and return the car to the owner in another state, it was held that garnishment served on the domestic company would not in the absence of a lien hold the foreign car. This decision was based upon the local law, and in the same case it was held that such garnishment was not illegal on the ground that it affected interstate commerce.\*\*\*

R. 1919C, 710. *Southern Pacific Co. v. Arizona* 249 U. S. —, 63 L. Ed. —, 39 Sup. Ct. —.

238. *Kanotex Refining Co. v. A. T. & S. F. Ry. Co.*, 34 I. C. C. 271, 276. Applying the rule quoted see: *Alabama G. S. R. Co. v. McFadden & Bros.*, 232 Fed. 100; same case 241 Fed. 562 — C. C.

A. — *Missouri K. & T. Ry. Co. v. Ashinger*, 162 Pac. 814.

239. *Southern Flour & Grain Co. v. Northern Pac. Ry. Co.*, 127 Ga. 626. 56 S. E. 742, 9 L. R. A. (N. S.) 853, 119 Am. St. Rep. 356; *Southern Ry. Co. v. Brown*, 131 Ga. 245, 62 S. E. 177. Agreeing with the Georgia court on

The same court subsequently held that where "the car was an empty freight car, and all use thereof by the claimant under the contract had ceased, and nothing remained to be done except to return it to the owner," that the levy of an attachment upon the car was valid."<sup>40</sup>

The questions of local law are not within the purview of this discussion and the differences between the state courts as to the Federal question have as to the general right been settled by the Supreme Court of the United States.

A case arose where certain freight cars and certain credits of a corporation of Indiana and Ohio were sought to be reached by garnishment against a carrier in Iowa which had in its possession such cars and credits. The cars had moved to Iowa in interstate commerce and the credits arose from such commerce. The cars had been unloaded and had not started on the return trip. The trial federal judge denied effect to the garnishment in language which presents that view as forcibly as it can be expressed."<sup>41</sup> The Supreme Court reversed the lower court and held that under the circumstances of that case the garnishment was valid. The opinion of the court written by Mr. Justice McKenna indicates that there might be circumstances under which the attachment or garnishment would not be valid."<sup>42</sup>

the right growing out of the contract but disagreeing as to the question of interstate commerce, see, *Wall v. Norfolk & W. Ry. Co.*, 52 W. Va. 485, 44 S. E. 294, 64 L. R. A. 501, and see note, 94 Am. St. Rep. 948.

240. *Cent. of Ga. Ry. Co. v. Evans*, 133 Ga. 639, 66 S. E. 788. For other authorities discussing the question see, *Michigan C. R. Co. v. C. & M. L. S. R. Co.*, 1 Ill. App. 399,—; *Connery v. R. R. Co.*, 92 Minn. 20, 99 N. W. 365; *Shore & Bro. v. Baltimore & O. Ry. Co.*, 76 S. C. 472, 57 S. E. 526; *Seibels v. Northern C. Ry. Co.*, 80 S. C. 133, 61 S. E. 435; *Chicago & N. W. Ry. Co. v. Forest*

*County*, 95 Wis. 80, 70 N. W. 77. A Negative answer has been given in the following cases: *DeRochemont v. New York C. & H. R. Co.*, 75 N. H. 158, 71 Atl. 868; *Cavanaugh Bros. v. Chicago, R. I. & P. Ry. Co.*, 75 N. H. 243, 72 Atl. 694. See also *Humphries v. Hopkins*, 81 Cal. 551, 22 Pac. 892; *Montrose Pickle Co. v. Dodson*, 76 Iowa 172, 40 N. W. 705, 2 L. R. A. 417, 14 Am. St. Rep. 213; *Bates v. Chicago, M. & St. P. Ry. Co.*, 60 Wis. 296, 19 N. W. 72, 50 Am. St. Rep. 369.

241. *Davis v. Cleveland, C. C. & St. L. R. Co.*, 146 Fed. 403, 411, and see cases cited.

242. *Davis v. Cleveland, C. C. &*

§ 43. **Rates.**—A common carrier is so far engaged in the performance of a public service that its rates or charges may, within certain limitations, be fixed by governmental agencies. This principle not only had its foundation in the earliest known laws,<sup>242</sup> but it is a principle which has been exercised and accepted with significant uniformity. The Supreme Court of the United States said: "State regulation of railroad rates began with railroad transportation;" and in the same opinion it was said:<sup>243</sup> "The authority of the state to limit by legislation the charges of common carriers within its borders was not confined to the power to impose limitations in connection with grants of corporate privileges. In view of the nature of their business, they were held subject to legislative control as to the amount of their charges unless they were protected by their contract with the state."

This general power to regulate is co-extensive with the need of regulation and is not limited to the regulation of those businesses for the regulation of which there is legislative precedent. "The underlying principle," said the Supreme Court,<sup>244</sup> "is that business of certain kinds holds such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation;" or to use a

St. L. R. Co., 217 U. S. 157, 54 L. Ed. 708, 30 Sup. Ct. 463, cited in Minnesota Rate Cases at pp. 409 and 410; and see Pullman Co. v. Linke, 202 Fed. 1017. See Section 440-1, *post*.

243. *Stephens v. Cent. of Ga. Ry. Co.*, 138 Ga. 625, 75 S. E. 1041, 42 L. R. A. 541, Ann. Cas. 1913E, 609.

244. *Simpson v. Shepard*, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729. At page 412 of the original opinion is given a list of early state laws, which list is followed by a history of the decisions of the Supreme Court relating to rate regulation by the states. For a further summary of state legi-

slation see, *Interstate Com. Com. v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 495, 496, 42 L. Ed. 243, 17 Sup. Ct. 896. A statute fixing a rate on one commodity, oil, was sustained by the Supreme Court of Kansas,—*Tucker v. Missouri Pac. R. Co.*, 82 Kan. 222, 108 Pac. 89; and see *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. Ed. 1011, 34 Sup. Ct. 612, sustaining a law of Kansas fixing the price of fire insurance.

245. Quoted from *Budd v. New York* 117 N. Y. 27, 5 L. R. A. 559, 15 Am. St. Rep. 460, 22 N. E. 670, 143 U. S. 517, 36 L. Ed. 247, 4 I. C. R. 45, 12 Sup. Ct. 468. See for citations 58 L. Ed. 1021.

briefier statement of that Court: "The basis of the ready concession of the power of regulation is the public interest."<sup>246</sup>

In the early history of state regulation of railroad rates, the Supreme Court used language that "went further than to sustain the state law with respect to rates for purely intrastate carriage" and "treated as being within the state power" rates on interstate transportation. This decision was very soon modified and the power of the state limited to regulating rates on intrastate transportation.<sup>247</sup>

It has been held, upon what seems inconclusive reasoning, that where a state, being the owner of an interstate railroad, leases the road with a provision reserving to the state the right to make "just and reasonable rules, orders, schedules of freight and passenger tariffs," that such reservation so far as concerns interstate rates is void as in conflict with the commerce clause of the Federal constitution. It would seem that as the state, as owner, like other owners, had the right to initiate rates intrastate or interstate, such right could be reserved in a lease of its road and that in the first instance the state could require its lessee to comply with the lease. The Interstate Commerce Commission could control the interstate rate so fixed in like manner as other rates made by other owners of carriers, but that fact should not prevent the state from making the rate in the first instance.<sup>248</sup>

In the Minnesota Rate cases,<sup>249</sup> the power of the states to regulate railroad rates for transportation between points in the same state is reiterated and fully stated. This power is, therefore, under existing Federal statutes, indisputable. The power is not, however, unlimited and must be exercised in such way as not to infringe the carrier's constitutional rights under the Fourteenth Amendment to the Constitution of the United States.

246. German-Alliance Ins. Co. v. Kansas, 233 U. S. 389, 58 L. Ed. 1011, 34 Sup. Ct. 612.

247. Simpson v. Shepard, 230 U. S. 352, citing as supporting the statement in the text, Peik v. Chicago & N. W. Ry. Co., 94 U. S. 164, 24 L. Ed. 97, and Wabash, St.

L. & P. Ry. Co. v. Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 Sup. Ct. 4.

248. State of Georgia v. Western & A. R. Co., 138 Ga. 835, 76 S. E. 577.

249. Simpson v. Shepard, *supra*, and Cent. of Ga. R. Co. v. R. R.

This right to prescribe rates includes the right to suspend proposed increase in rates<sup>250</sup> and to require the establishment, where such systems had been voluntarily established by the carrier, of commutation rates.<sup>251</sup>

Classification of commodities is a necessary preliminary to any system of rates, and the right to prescribe a rate for the future includes the right to classify commodities. This classification must not be arbitrary or unreasonable but, in making a classification, the rate making body "is not precluded from the consideration of economic considerations recognized by the carriers in the conduct of their business," but "may consider and act on every economic or industrial factor potentially influencing the operation of a railroad in the transportation of freight."<sup>252</sup> Joint rates would, if the whole rate is intrastate be within the regulating power of the states.<sup>253</sup> The right to prescribe reasonable rates includes the right to prohibit rates which are unjustly discriminatory.<sup>254</sup>

While the Federal government had control and operated interstate railroads and telephone companies intrastate rates were withdrawn from the regulatory powers of the states.<sup>255</sup>

Com. of Ala., 209 Fed. 75; Darnell v. Edwards, 209 Fed. 99; Chicago & N. W. R. Co. v. Smith, 210 Fed. 632; Sou. Pac. Co. v. R. R. Com. of Oregon, 208 Fed. 926; Puget Sound Traction Light & Power Co. v. Reynolds, 223 Fed. 371; Detroit & Mackimac R. Co. v. Fletcher Paper Co., 248 U. S. 30, 63 L. Ed. —, 39 Sup. Ct. —.

250. Trenton & M. C. T. Corp. v. Trenton, 227 Fed. 502, Affirmed 229 Fed. 140, 143 C. C. A. 316.

251. Penn. R. Co. v. Towers, 245 U. S. 6, 62 L. Ed. 117, 38 Sup. Ct. 2.

252. Southern Ry. Co. v. Atlanta Stove Works, 128 Ga. 207, 57 S. E. 429, an able opinion, in which is discussed the principles of regulation.

253. Hill, *et al*, Com'rs. v. Wadley Sou. Ry. Co., 128 Ga. 705, 57 S. E. 795.

254. Portland Ry. Light & Power Co. v. R. R. Com. of Oregon, 229 U. S. 397, 57 L. Ed. 1248, 33 Sup. Ct. 820, affirming same styled case, 56 Or. 468, 105 Pac. 709.

255. Northern P. R. Co. v. North Dakota, 249 U. S. —, 63 L. Ed. —, 39 Sup. Ct. —. Construing Federal Control Act, Mar. 21, 1918, 40 Stat. L. Chap. 25, Comp. Stat. 1918, Sec. 3115-3/4A. Dakota Cent. Tel. Co. v. South Dakota, 249 U. S. —, 63 L. Ed. —, 39 Sup. Ct. —. Construing Res. of June 16, 1918, 40 Stat. L. 904, Chap. 154, Comp. Stat. 1918, Sec. 3115-3/4X. See Appendix 1.

§ 44. **Intrastate Rates Which Affect Interstate Rates.**—A state may not regulate intrastate rates by the standard of interstate rates by basing a rate for a short haul within the state upon the carrier's rate for the long haul over the same line when the long haul is between states.<sup>256</sup> And when local rates are made for the purpose and have the effect of so regulating transportation that commerce which might be interstate is forced to move intrastate, and when the local rates discriminate against the interstate rates, the regulation making such local rates is invalid.

The Railroad Commission of Texas established rates between points in that state which the railroads accepted, and which discriminated in favor of localities in Texas and against localities in Louisiana. Upon petition on behalf of the localities in Louisiana against the carriers, the Interstate Commerce Commission held that this discrimination was unlawful and unjust.<sup>257</sup> Suit having been filed in the Commerce Court to set aside the order of the Commission, it was held that the carriers were guilty of unlawful and unjust discrimination, and that it was no defense that such discrimination resulted from the orders of the Texas Commission.<sup>258</sup> An appeal was taken from the Commerce Court to the Supreme Court,<sup>259</sup> and the order of the Commission was sustained in an opinion written by Mr. Justice Hughes. The opinion was based upon the right of Congress "to keep the highways of interstate communication open to interstate traffic upon fair and equal terms." The opinion of the Court is so clear and cogent that its correctness can but be acknowledged. To permit states to prescribe interstate rates under which citizens of the states may exclude from competition with themselves, shippers located in other states from whose locations the transportation conditions are similar to those from points in the state, would be to effectuate the purposes to prevent which was the principal object of the Constitution of the United States. Not

256. *Louisville & N. R. Co. v. Eubanks*, 184 U. S. 27, 46 L. Ed. 416, 22 Sup. Ct. 277.

257. *Railroad Com. of La. v. St. Louis S. W. R. Co.* 23 I. C. C. 31.

258. *Texas & P. R. C. v. United States*. Commerce Court Reports No. 68, p. 655, 205 Fed. 380.

259. *Houston E. & W. T. Ry. Co. v. U. S.*, 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833.

only it the decision in the Shreveport case, cited in notes 216, 217 and 218, *supra*, in accord with the Constitution, any other rule would result in endless confusion and frequent injustice.<sup>260</sup>

The principle announced in the Shreveport Case, *supra*, has been followed by the Commission and the courts and there has been a constantly increasing recognition of the propriety of the decision.<sup>261</sup> So far is this true that the Act of 1920 makes statutory the Courts' construction of the original Commerce Act.<sup>262</sup>

§ 45. **Limitations on the Power of States to Regulate Intra-state Rates.**—When private property is devoted to a public use, organized society has the right to regulate the charges for such use. This right may be exercised by or under the authority of state laws when the use is within the state. and subject to the further limitation that the regulation does not extend to a taking of private property without due process of law or without a fair compensation. This principle as we have seen (Section 36 *supra*) is old, but the need in this country for its application is comparatively recent. The first of the important applications of the principle was made in *Munn*

260. *Corporation Com. of Okla. v. A. T. & S. F. Ry. Co.*, 31 I. C. C. 532; *Trier v. C., St. P. M. & O. Ry. Co.*, 30 I. C. C. 352, 707; *Rates on Beer*, 31 I. C. C. 544; *Points*, 32 I. C. C. 361; *Merchants Exchange of St. Louis, Mo. v. B. & O. R. Co.*, 34 I. C. C. 341.

261. Secs. 184, 335, *post*.

262. For a general discussion of the question see *Federal v. State Regulations of Railroads* by the author hereof, *Case & Comment*, Vol. 23, No. 5, Page 372 *et. cet.* Subsequent developments of the Shreveport case are shown in *Railroad Com. of La. v. A. H. T. Ry. Co.*, 41 I. C. C. 83; 43 I. C. C. 45; *Eastern Tex. R. Co. v. Railroad Com. of Texas*, 242 Fed. 300; *Looney v. Eastern Tex. R. Co.* 247

U. S. 214, 62 L. Ed. 1084, 38 Sup. Ct. 460. The rule was applied to express rates. *Traffic Bureau v. American Exp. Co.* 39 I. C. C. 703; *Amer. Exp. Co. v. South Dakota*, 244 U. S. 617, 61 L. Ed. 1352, 37 Sup. Ct. 656. To Passenger Fares: *Business Men's League of St. Louis v. A. T. & S. F. R. Co.*, 41 I. C. C. 13, 503; *Illinois C. R. Co. v. Public Utilities Com. of Ill.* 245 U. S. 493, 62 L. Ed. 425, 38 Sup. Ct. 170; *Business Men's League v. A. T. & S. F. R. Co.*, 49 I. C. C. 713. For other cases see: *Merchant's Exchange v. B. & O. R. Co.*, 34 I. C. C. 341; *The Missouri River-Nebraska Cases*, 40 I. C. C. 201; *Memphis v. Chicago R. I. & P. Ry.* 43 I. C. C. 121; *Texarkana Frt. Bureau v. St. L. I. M. & S. Ry.*

v. Illinois and the other Granger cases,<sup>263</sup> decided by the Supreme Court of the United States in 1877. Then follow; the Railroad Commission cases of 1886,<sup>264</sup> *Dow v. Beidelman* of 1888,<sup>265</sup> the Minnesota case<sup>106</sup> of 1890, the Texas Commission case of 1894,<sup>267</sup> the Turnpike case<sup>268</sup> in 1896, *Smyth v. Ames*<sup>269</sup> in 1898, the National City case in 1899,<sup>270</sup> the Stock Yard case in 1901,<sup>271</sup> the Water Rate cases of 1903,<sup>272</sup> and the Water and Gas cases of 1909.<sup>273</sup> These and other cases will be found in a note hereto.<sup>274</sup>

Co., 43 I. C. C. 224; *Memphis Merchants Exchange v. I. C. R. Co.* 43 I. C. C. 378; *Business Men's League v. A. T. & S. F. Ry. Co.*, 44 I. C. C. 308; *LaCrosse Shippers Assn. v. C. & N. W. Ry. Co.*, 44 I. C. C. 512; *Royster Guano Co. v. A. C. L. Ry. Co.*, 50 I. C. C. 34; *Landon v. Public Utilities Com. of Kansas* 234 Fed. 152, 242 Fed. 658, 245 Fed. 950.

263. *Munn v. Illinois*, 94 U. S. (4 Otto.) 113, 24 L. Ed. 77; *Chicago B. & Q. R. Co. v. Iowa (v. Cutts)*, 94 U. S. 155, 24 L. Ed. 94; *Pelk v. Chicago & N. W. R. Co.*, 94 U. S. 164, 24 L. Ed. 97; *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179, 24 L. Ed. 99; *Winona & St. Paul R. Co. v. Blake*, 94 U. S. 180, 24 L. Ed. 99; *Stone v. Wisconsin*, 94 U. S. 181, 24 L. Ed. 102.

264. *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 29 L. Ed. 636, 6 Sup. Ct. 334, 1191; *Stone v. Ill. Cent. R. Co.*, 116 U. S. 347, 29 L. Ed. 650, 6 Sup. Ct. 348, 1191; *Stone v. New Orleans & N. E. R. Co.*, 116 U. S. 352, 29 L. Ed. 651, 6 Sup. Ct. 349, 391.

265. *Dow v. Beidelman*, 125 U. S. 680, 31 L. Ed. 841, 8 Sup. Ct. 1028.

266. *Chicago, M. & St. Paul R. Co. v. Minnesota*, 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462.

267. *Reagan v. Farmers' Loan & Trust Co.* 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047.

268. *Covington & L. Turnpike R. Co. v. Sandford*, 164 U. S. 578, 41 L. Ed. 561, 17 Sup. Ct. 198.

106. 42 L. Ed. 819, 18 Sup. Ct. 418.

269. *Smyth v. Ames*, 169 U. S. Freight Rates from Minnesota Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804.

271. *Cotting v. Godard*, 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. 30.

272. *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 47 L. Ed. 887, 23 Sup. Ct. 531; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571.

273. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. 148; *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. Ed. 387, 29 Sup. Ct. 392.

274. *Budd v. New York*, 143 U. S. 517, 36 L. Ed. 247, 4 I. C. R. 45, 12 Sup. Ct. 468; *Brass v. North Dakota ex rel. Stoesser*, 153 U. S. 391, 38 L. Ed. 757, 4 I. C. R. 670, 14 Sup. Ct. 857. See also the following cases in state and federal courts: *People v. Budd*, 117 N. Y. 1, 5 L. R. A. 599, 22 N. E. 670; *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.*, 30 Ohio St. 604; *State ex rel. Attorney*

In 1913,<sup>778</sup> the Supreme Court, in a series of cases involving state made rates relating to intrastate transportation, announced principles which are as important as those in the Granger and Railroad Commission cases, *supra*. These prin-

*General v. Columbus Gaslight & Coke Co.*, 34 Ohio St. 572, 32 Am. Rep. 390; *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 128; *Baker v. State*, 54 Wis. 368, 12 N. W. 12; *Nash v. Page*, 80 Ky. 539, 44 Am. Rep. 490; *Girard Point Storage Co. v. Southwalk Foundry Co.*, 105 Pa. 248; *Sawyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 27; *Brechbill v. Randall*, 102 Ind. 528, 52 Am. Rep. 695, 1 N. E. 362; *Dela-ware, L. & W. R. Co. v. Central Stock Yard & Transit Co.*, 45 N. J. Eq. 50, 6 L. R. A. 855, 17 Atl. 146; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. 48; *Railroad Commission Cases*, 116 U. S. 307, sub. nom. *Stone v. Farmers' Loan & Trust Co.*, 29 L. Ed. 636, 6 Sup. Ct. 334, 388, 1191; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. Ed. 244, 1 I. C. R. 31, 7 Sup. Ct. 4; *Dow v. Beldelman*, 125 U. S. 680, 31 L. Ed. 841, 2 I. C. R. 56, 8 Sup. Ct. 1028; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. Ed. 970, 3 I. C. R. 209, 10 Sup. Ct. 462, 702; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L. Ed. 176, 12 Sup. Ct. 400; *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 38 L. Ed. 1014, 4 I. C. R. 560, 14 Sup. Ct. 1047; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. 484; *Covington & L. Turnpike Road Co. v. Sanford*, 164 U. S. 578, 41 L. Ed. 560, 17 Sup. Ct. 198; *Smyth v. Ames*, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418; *San*

*Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 44 L. Ed. 417, 20 Sup. Ct. 336; *Atlantic C. L. R. Co. v. North Carolina Corp. Com.*, 206 U. S. 1, 51 L. Ed. 933, 27 Sup. Ct. 585, 11 Ann. Cas. 398. *Oklahoma Operating Co. v. Love*, 251 U. S. —, 64 L. Ed. —, 40 Sup. Ct. —, 275. *Minnesota Rate Cases*, *Simpson v. Shepard*, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729; *Missouri Rate Cases*, *Knott v. C. B. & Q. R. Co.*, 230 U. S. 474, 57 L. Ed. 1571, 33 Sup. Ct. 975; *West Virginia Cases*, *Chesapeake & O. Ry. Co. v. Conley*, 230 U. S. 513, 57 L. Ed. 1597, 33 Sup. Ct. 985; *Oregon Cases*, *Oregon R. & N. Co. v. Campbell*, 230 U. S. 525, 57 Fed. 1625, 33 Sup. Ct. 1011, 177 Fed. 318, 180 Fed. 253; *Southern Pac. Co. v. Campbell*, 230 U. S. 537; *Arkansas Cases*, *Allen v. St. Louis I. M. & S. Ry. Co.*, 230 U. S. 553, 57 L. Ed. 1625, 33 Sup. Ct. 1030; *Indiana Rate Cases*, *Wood v. Vandalia R. Co.*, 231 U. S. 1, 58 L. Ed. 97, 34 Sup. Ct. 7; *Kentucky Rate Case*, *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 58 L. Ed. 229, 34 Sup. Ct. 48; *Cent. of Ga. R. Co. v. R. R. Com. of Ala.* 209 Fed. 75, 79; *Chicago & N. W. Ry. Co. v. Smith*, 210 Fed. 632; *Cent. of Ga. R. Co. v. Georgia R. R. Com.*, 215 Fed. 421. For a continuation of the *Arkansas Cases* see *Boyle v. St. Louis & S. F. Ry. Co.*, 222 Fed. 539.

ciples are but the logical application of prior decisions and Mr. Justice Hughes, in writing the opinions of the court, has ably and exhaustively discussed the question and vindicated the rights of the states to regulate rates of charges of public carriers within their respective borders. In the Minnesota Rate cases, the learned Justice said:

"If this authority of the state be restricted, it must be by virtue of the paramount power of Congress over interstate commerce and its instruments; and, in view of the nature of the subject, a limitation may not be implied because of a dormant federal power, that is, one which has not been exerted, but can only be found in the actual exercise of federal control in such measure as to exclude this action by the state which otherwise would clearly be within its province."

This right is in all cases subject to constitutional limitations, and there is a clear intimation, as shown in Sec. 6, *supra*, that the federal government has not exercised as yet all its powers under the commerce clause of the Constitution.

The right of Congress was stated by the Supreme Court in sustaining an order of a State Commission prescribing a rate where, as said by the Court: "It was proper for the Interstate Commerce Commission to consider the rate as part of a through rate from points outside of the state. It was equally proper for the State Commission to consider it as part of the intrastate haul, and we do not think the rates were so related as to exclude the exercise of jurisdiction by the State Commission." This statement would permit for the same movement one rate when the freight originated out of the state and another rate when the freight originated in the state, an anomalous situation which should be remedied. Congress by the Transportation Act of 1920 regulated intra-

276. Chicago M. & St. P. R. Co. v. Public Utilities Com. of Ill. 242 U. S. 333, 61 L. Ed. 341, 37 Sup. Ct. 173. Dist. Judge Booth in *Landon v. Public Utilities Com. of Kansas* 242 Fed. 658 Collates and intelligently discusses the cases wherein are stated the limitations

of the powers of the states indirectly to affect interstate commerce. These powers include the right to require a service as well as to fix a charge. *Brooklyn Heights R. Co. v. Straus*, 245 Fed. 132.

state rates somewhat more than theretofore, but then did not go as far as it constitutionally might.

§ 46. **Property Basis for Returns.**—Investors are entitled to a reasonable return on the fair value of the property devoted to the public use. Until there shall be an authoritative determination of the value of railroad property, Commissioners and Courts must as best they may arrive at this value.

In applying the decisions of courts to the question, it is necessary to keep in mind the different functions performed by courts and by quasi-legislative tribunals.

The courts usually must determine the strictly legal question, Is the rate under investigation "so unreasonably low that the carriers are deprived of their property without due process of law and denied the equal protection of the law?" *Minnesota Rate Cases, supra.*

"The rate making power is a legislative power and necessarily implies a range of legislative discretion; and the question to be determined by a tribunal to which this power has been delegated is, Is the rate just and reasonable? (*Id.*)

Obviously a rate may be less than just and reasonable without being confiscatory. While a tribunal exercising the legislative function may not make a rate so low as to be violative of the constitutional restrictions and legal principles announced by courts of binding authority, such tribunal may not disregard its duty to exercise its "legislative discretion," the power to apply which, said Mr. Justice Moody, "is a delicate and dangerous function, and ought to be exercised with a keen sense of justice." *Knoxville v. Water Co., supra.*

"Fair value" has been defined as "the reasonable value of the property at the time, it is being used for the public." *San Diego Land Co. v. National City, supra.*

This, excepting the fact that it fixes the time at which value is to be found, is more a restatement of the question than a definition of the term; "reasonable" being as inexact as "fair."

In the leading and much cited case of *Smyth v. Ames*, the court had for determination the legal question of whether or not a legislative act violated the constitutional rights of the carriers, and the opinion of the court must be understood as

being limited by the question involved. The court held that the law demanded a "fair return" on the fair value of the property used \* \* \* for the convenience of the public. What was the "fair value" and what would be a "fair return," were mixed questions of law and "legislative discretion." The court determined only the legal question and found that "the act, if enforced, would have deprived each of the railroad companies \* \* \* of the just compensation secured to them by the Constitution." (p. 547.) In reaching this determination, however, the court stated rules which should be considered in "all calculations as to the reasonableness of rates." (p. 546.) These rules must be followed by rate making bodies. In ascertaining "value" the court held that consideration must be given to the following facts:

- (1) "The original cost of construction."
- (2) "The amount expended in permanent improvements."
- (3) "The amount and market value of its (the carrier's) bonds and stock."
- (4) "The present as compared with the original cost of construction."
- (5) "The probable earning capacity of the property under particular rates prescribed by statute."
- (6) "The sum required to meet operating expenses."

All these to be "given such weight as may be just and right in each case." P. 547.

In the Minnesota Rate Cases, *supra*, p. 433 of the opinion, the "legislative discretion" is distinguished from the judicial question: has the state "overstepped the constitutional limit?" While the court in that case cited as correct "general principles" those announced in *Smyth v. Ames* (p. 434) Mr. Justice Hughes, who delivered the opinion of the court, said: "The ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts." (p. 434.) He then applied somewhat more restricted rules than those stated in *Smyth v. Ames*. In so doing, however, he was careful to state that he was considering "a judicial finding" (p. 451); that the "judicial power to declare legislative action invalid upon constitutional grounds is to be exercised only in clear cases" (p. 452);

and "that we are concerned with a charge of confiscation of property" (p. 458). So the court held that the Minnesota rates had not been proven to be confiscatory, but it was not found that such rates were just and reasonable.

In Pennsylvania the courts have authority upon complaint to determine whether or not existing rates are reasonable."<sup>77</sup>

In a Pennsylvania case<sup>78</sup> it was said: "The primary basis of any calculation as to the value of a water plant must be the money actually invested by the owners. If the earnings of the company have been used to improve the property, it is counted as so much more cash invested."

When the commodity shipped is natural gas, in fixing a basis for returns, the fact that the supply is diminishing must be considered, otherwise there is confiscation."<sup>79</sup>

**§ 47. When Does a Rate Violate Rights under the Fourteenth Amendment?**—That "prescribing rates for the future is an act legislative, and not judicial, in kind" cannot be disputed,<sup>80</sup> but whether or not a particular rate regulation takes property "without just compensation," is at least in part a question of law.

The legislative branch of the government must obey the constitution, and it has long been established by the Supreme Court of the United States that when it is called upon to determine whether or not an act of the legislative branch shall be enforced, it can and must decide whether the passage of such act was authorized by the fundamental law of the Union. What is just compensation is a flexible term, equally honest and equally competent men may materially disagree on this subject. Should the net income on the investment be 2, 3, 4, 5, 6, or 7 per cent? If the legislature, or a board duly created and acting in a perfectly legal way, fixes a particular amount as the maximum income which shall be earned by a

277. *Brymer v. Butler Water Co.*, 179 Pa. St. 331, 36 Atl. 249.

278. *Wilkes-Barre v. Spring Brook Water Co.*, 4 Lack. Pa. Leg. News 367; *The Transportation Act 1920*, Sec. 15 A specifies other

facts which must receive consideration.

279. *Landon v. Public Utilities Com. of Kansas* 234 Fed. 152.

280. *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 58 L. Ed. 229, 34 Sup. Ct. 48, and cases cited.

public carrier, shall the courts annul such action, if in the opinion of the particular judge or judges trying the case, the amount fixed is not a just and fair compensation? That the courts in a clear case where there can be little or no doubt that the compensation is inadequate, must act under their obligation to support and enforce the Constitution of the United States, and in such cases declare the rate prescribed illegal will not, as has sometimes been intimated, make the Supreme Court of the United States the supreme legislative tribunal in this country. It must be a clear case to justify action by the courts, but as said by Mr. Justice Moody in *Knoxville Water case*, *supra*:

"The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind. Regulation of public service corporations, which perform their duties under conditions of necessary monopoly will occur with greater and greater frequency as time goes on. It is a delicate and dangerous function, and ought to be exercised with a keen sense of justice on the part of the regulating body, met by a frank disclosure on the part of the company to be regulated."

What percentage on the amount invested in the public use the investors are entitled to receive must, of course, depend upon many considerations. Some of which are stated in the *Knoxville Water case* and the *New York Gas case*. In the *Knoxville case*, where the proof indicated clearly that the earnings, after deducting two per cent for depreciation, would net four per cent, the court held that confiscation had not been proved. In the *Gas case* Mr. Justice Peckham, speaking for the court, said: "Taking all facts into consideration, we concur with the court below on this question, and think complainant is entitled to six per cent on the fair value of its property devoted to the public use."

The Circuit Judge, in the *Minnesota Rate cases*,<sup>281</sup> held that a "net income of 7 per cent per annum on the value of a railroad property . . . is not more than the fair return to which a railroad company is entitled under the

281. *Shepard v. Northern Pac. Ry. Co.* 184 Fed. 765, reversed, *Simpson v. Shepard*, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729.

Fourteenth Amendment to the Constitution." The Supreme Court reversed the Circuit Judge, on the ground that confiscation had not been shown but did not determine what was a reasonable rate of return.

In discussing telephone rates, the Supreme Court declined to express an opinion as to whether or not 6 per cent on the investment was confiscatory.<sup>282</sup>

In another case where the property of the corporation was fixed at a value higher than the cost and a return of 6 per cent was fixed on such value, the Supreme Court refused to set aside the rate yielding such return. In this case, the question of the value of the franchise was discussed and Mr. Justice Holmes stated the difficulty of solving the problem in this language.<sup>283</sup>

"An adjustment of this sort under a power to regulate rates has to steer between Scylla and Charybdis. On the one side if the franchise is taken to mean that the most profitable return that could be got, free from competition, is protected by the Fourteenth Amendment, then the power to regulate is null. On the other hand if the power to regulate withdraws the protection of the Amendment altogether, then the property is nought. This is not a matter of economic theory, but of fair interpretation of a bargain. Neither extreme can have been meant. A midway between them must be hit." In the Des Moines Gas case <sup>284</sup> the court said:

"Nor do we think that there was error in refusing an injunction upon the conclusion reached that a return of 6 per cent per annum on the valuation would not be confiscatory. This is especially true in view of the fact that the ordinance was attacked before there was opportunity to test its result by actual experience."

None of these cases announces a general rule, and it is obvious that what would be reasonable in one case might be unjust in another. A railroad which must from its very nature be more or less of a monopoly would not be entitled to as large

282. *Louisville, City of, v. Cumberland Tel. & Tel. Co.*, 225 U. S. 430, 56 L. Ed. 1151, 32 Sup. Ct. 741.

283. *Cedar Rapids Gas Co. v. Cedar Rapids*, 223 U. S. 655, 56 L. Ed. 594, 32 Sup. Ct. 389.

284. *Des Moines Gas Co. v. City of Des Moines*, 238 U. S. 153, 59 L. Ed. 1244, 35 Sup. Ct. 811.

a return as a more hazardous business. All these questions are primarily questions of policy for the legislature, and it is only when the rate prescribed violates the constitutional requirement that courts may act.

In *San Diego Land & Town Co. v. National City*, it was said:<sup>285</sup> "What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public."

What is a "fair return" is primarily a legislative question, and Mr. Justice Hughes, in the *Minnesota Rate cases*, *supra*, stated the power of the courts by saying: "We do not sit as a board of revision to substitute our judgment for that of the legislature, or of the commission lawfully constituted by it, as to matters within the province of either."

Only when the circumstances are exceptional should a finding of an administrative or legislative tribunal be set aside;<sup>286</sup> and the carrier must have shown proper efforts to have developed traffic.<sup>287</sup>

Much difficulty is experienced in distributing operating expenses and operating revenues between the intra-state and interstate business of railroads. Some of these can be allocated but a large part must be distributed. In section 45, *supra*, are cited cases, especially the *Minnesota Rate Cases* and the 1913 cases, in which the carriers failed to overcome this difficulty. A method was applied in the *Arkansas Rate Case* which perhaps in the present state of railroad accounting is as nearly accurate as is possible. Judge Trieber applied the method and his decision was affirmed.<sup>288</sup>

285. *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804. See also *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. 148; *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. Ed. 382, 29 Sup. Ct. 192; *Smyth v. Amess*, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418. And see *Atlantic C. L. R. v. North Caro-*

*lina Corp. Com.*, 206 U. S. 1, 26, 51 L. Ed. 933, 27 Sup. Ct. 585, when speaking of rate making the Chief Justice referred to the "flexible limit of judgment which belongs to the power to fix rates."

286. *Ann Arbor R. C. v. Fellows* 236 Fed. 387.

287. *Darnell v. Edwards*, 244 U. S. 564, 61 L. Ed. 1317, 37 Sup. Ct. 701.

288. *Boyle v. St. L. & S. F. R. Co.* 222 Fed. 539, P. U. R. 1916 A

The question depending so largely upon the special facts of each case, it is unlikely that the Supreme Court will ever prescribe a hard and fast rule as to the percentage of income that will constitute a "fair return." Congress exercising its legislative functions has by Transportation Act 1920, adding section 15-a, prescribed  $5\frac{1}{2}$  and 6 per cent as constituting a fair return on "aggregate value."

**§ 48. Rates—Evidence That Rate Is Confiscatory—Rates on a Few Commodities.**—It is easy to say that a railroad is entitled to earn a fair return upon the property devoted to the business of common carriage, but it is difficult to determine in a concrete case what is a fair return. The cost of moving one commodity cannot be definitely ascertained, much of such cost not being capable of allocation. When a rate on one or a few commodities is fixed by legislative act, and the rates are attacked in court, the presumption is that the rate is fair, and in ordinary cases the presumption cannot be overcome by any definite proof, when the rate is prescribed by a commission.

It would, therefor, seem that when the commission, after a full hearing, and aided by the long experience and special training of its members, fixes a rate on one or a few commodities that represent in comparison a very small part of the traffic of the carrier, such rate would be binding on all courts, because no one could prove it did not yield a just compensation. This statement has reference to such orders as the commission will issue. Of course, a rate on even one commodity might be so low as to be clearly illegal. These views are expressed by Mr. Justice Brewer, in the Florida Phosphate Rate case,<sup>49</sup> as follows:

"The order of the commission was not operative upon all local rates, but only fixed the rate on a single article, to wit,

49; *Rowland v. Boyle* 244 U. S. 106, 61 L. Ed. 1022, 37 Sup. Ct. 577. See also *Corp. Com. of Okla. v. A. T. & S. F. R. Co.* 31 I. C. C. 532; *Memphis v. Chicago R. I. & P. R. Co.* 39 I. C. C. 256. The question at present is one of fact, *Groesbeck v. Duluth & S. S. & A. R. Co.* 250 U. S. 607, 64 L. Ed. —, 40 Sup. Ct. —.

289. *Atlantic C. L. R. Co. v. Florida*, 203 U. S. 256, 51 L. Ed. 174, 27 Sup. Ct. 108. See also *Seaboard A. L. R. Co. v. Florida*, 203 U. S. 261, 51 L. Ed. 175, 27 Sup. Ct. 109.

phosphate. There is no evidence of the amount of phosphates carried locally; neither is it shown how much a change in the rate of carrying them will affect the income, nor how much the rate fixed by the railroads for carrying phosphate has been changed by the order of the commission. There is testimony tending to show the gross income from all local freights and the value of the railroad property, and also certain difficulties in the way of transporting phosphates, owing to the lack of facilities at the terminals. But there is nothing from which we can determine the cost of such transportation. We are aware of the difficulty which attends proof of the cost of transporting a single article, and, in order to determine the reasonableness of a rate prescribed, it may sometimes be necessary to accept as a basis the average rate of all transportation per ton per mile. We shall not attempt to indicate to what extent or in what cases the inquiry must be special and limited. It is enough for the present to hold that there is in the record nothing from which a reasonable deduction can be made as to the cost of transportation, the amount of phosphates transported, or the effect which the rate established by the commission will have upon the income. Under these circumstances it is impossible to hold that there was error in the conclusions reached by the Supreme Court of the state of Florida, and its judgment is affirmed."

Notwithstanding this presumption, rates on particular commodities may be shown to yield such a return as amounts to confiscation. The Supreme Court has said:<sup>290</sup> "While local interests serve as a motive for enforcing reasonable rates, it would be a very different matter to say that the state may compel the carrier to maintain a rate upon a particular commodity that is less than reasonable, or—as might equally be asserted—to carry gratuitously, in order to build up a local enterprise. That would be to go outside the carrier's undertaking, and outside the field of reasonable supervision of the

290. *Nor. Pac. R. C. v. North Dakota*, 236 U. S. 585, 59 L. Ed. 735, 35 Sup. Ct. 429; and to the same effect see *Norfolk & W. Ry. Co. v. Conley*, 236 U. S. 605, 59

L. Ed. 745, 35 Sup. Ct. 437. The *North Dakota* case, *infra*, is explained and distinguished in *Stonega Coke & Coal Co. v. L. & N. R. Co.*, 39 I. C. C. 523, 541.

conduct of its business, and would be equivalent to an appropriation of the property to public uses upon terms to which the carrier had in no way agreed." This principle, as was shown in the same case, does not deny the right to classify commodities; making rates thereon according to hazard, value of service which results in large part from the value of the commodity, and other well known considerations. The court said: "The legislature undoubtedly has a wide range of discretion in the exercise of power to prescribe reasonable charges, and it is not bound to fix uniform rates for all commodities, or to secure the same percentage of profit on every sort of business. There are many factors to be considered—differences in the articles transported, the care required, the risk assumed, the value of the service, and it is obviously important that there should be reasonable adjustments and classifications." Rates voluntarily established by a common carrier may be considered in determining whether or not the same rates are reasonable when prescribed by a state rate-making body."

**§ 49. Same Subject—Relative Cost of Different Kinds of Transportation.**—The same track, the same cars and, to a large extent, the same employees, are used or engaged in both interstate and intrastate commerce, and in passenger and freight transportation. When a state prescribes rates on intrastate transportation, and it is sought to show that such rates are confiscatory, to make proof thereof requires evidence as to the cost of the intrastate movement as well as of the value of the property devoted thereto. To a certain extent this cost may be allocated, but much of the cost of local or intrastate transportation relates to the use of property and the cost of service which are employed in both kinds of transportation.

The federal trial courts in the various rate cases which reached the Supreme Court in 1913 devoted much argument to this question, and the witnesses in the cases expressed widely different opinions with reference thereto. All agreed that the intrastate movement cost more than the interstate movement. Some placed this excess cost as low as fifty per cent

291. *Louisville & N. R. Co. v. 35 Sup. Ct. 147. Sec. 102. post, Finn, 235 U. S. 601, 59 L. Ed. 379,*

and some as high as seven hundred per cent.<sup>292</sup> There is a difference between the cost, as related to the receipts, of passenger and freight business; what this difference is, is a fact about which there are varying opinions. In the Minnesota Rate cases, at page 432, Mr. Justice Hughes speaks of "the extreme difficulty and intricacy of the calculations which must be made in the effort to establish a segregation of intrastate business for the purpose of determining the return to which the carrier is properly entitled therefrom;" and in the course of the opinion in that and the related cases reported in Volumes 230 and 231 of the Supreme Court Reports, the methods adopted by the trial courts are rejected as unsatisfactory, and the conclusion as well as the true method is indicated by the statement in the opinion at page 465 of Volume 230, as follows:

"We are of the opinion that on an issue of this character involving the constitutional validity of state action, general estimates of the sort here submitted, with respect to a subject so intricate and important, should not be accepted as adequate proof to sustain a finding of confiscation. While accounts have been kept so as to show the relative cost of interstate and intrastate business, giving particulars of the traffic handled on through and local trains, and presenting data from which such extra cost, as there may be, of intrastate business may be suitably determined, it would appear to have been not impracticable to have had such accounts kept or statistics prepared at least during test periods properly selected. It may be said that this would have been a very difficult matter, but the company having assailed the constitutionality of the state acts and orders was bound to establish its case, and it was not entitled to rest on expressions of judgment when it had it in its power to present accurate data which would permit the court to draw the right conclusion."<sup>293</sup>

292. *Shepard v. Northern Pac. Ry. Co.*, 184 Fed. 765, 812 *et seq.*

293. For cases relating to methods to be adopted in determining the relative cost of different kinds of transportation, see *Minneapolis & St. L. R. Co. v.*

*Minnesota*, 186 U. S. 257, 262, 46 L. Ed. 1151, 22 Sup. Ct. 900; *St. Louis & S. F. R. Co. v. Hadley*, 168 Fed. 317, 348; *Ames v. Union Pac. R. Co.*, 64 Fed. 165; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 44 L. Ed. 417, 20

Seeking to conform to the rule stated above in the quotation from the opinion in the Minnesota Rate cases, carriers serv-

- Sup. Ct. 336; *Smyth v. Ames*, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418; *Chicago, M. & St. P. R. Co. v. Keyes*, 91 Fed. 47, 55; *Re Arkansas Rates*, 163 Fed. 141; *Missouri, K. & T. R. Co. v. Love*, 177 Fed. 493, 498, 499; *Love v. Atchison, T. & S. F. R. Co.*, 185 Fed. 321, 330, 331, 218 U. S. 675, 220 U. S. 618; *Shepard v. Northern Pac. R. Co.*, 184 Fed. 765, 810, 812; *Re Arkansas Rates*, 187 Fed. 290, 320, 344; *Cedar Hill Coal and Coke Co. v. Colorado & Southern Ry. Co.*, 16 I. C. C. 387, 393; *Gustin v. Atchison, T. & S. F. R. Co.*, 8 I. C. C. 277; *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. Ed. 382, 29 Sup. Ct. 192, 15 Am. Cas. 1034; *Atlantic C. L. R. Co. v. North Carolina Corp. Com.* 206 U. S. 1, 51 L. Ed. 933, 27 Sup. Ct. 585; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 663, 39 L. Ed. 567, 15 Sup. Ct. 484; *Southern Ry. Co. v. Atlanta Stove Works Co.*, 128 Ga. 207, 233, 234, 57 S. E. 429; *Wisconsin M. & P. R. Co. v. Jacobson*, 71 Minn. 519, 7 N. W. 893, 40 L. R. A. 389, 70 Am. St. Ry. 358, 179 U. S. 287, 302, 45 L. Ed. 194, 21 Sup. Ct. 115; *State v. Missouri P. Ry. Co.*, 76 Kan. 467, 92 Pac. 606; *Pensacola & A. R. Co. v. Florida*, 25 Fla. 310, 5 So. 833; *Morgan's R. & S. Co. v. R. R. Commission*, 109 La. 247, 33 So. 214; *People v. St. Louis A. & T. H. R. Co.*, 176 Ill. 512, 52 N. E. 292; *Chicago Union Traction Co. v. Chicago*, 199 Ill. 579, 65 N. E. 470; *Reagan v. Farmer's L. & T. Co.*, 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047; *San Diego Land Co. v. National City*, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804; *Covington & L. Turnpike Road Co. v. Sandford*, 164 U. S. 578, 596, 597, 41 L. Ed. 560, 17 Sup. Ct. 198; *Jerome Hill Cotton Co. v. Missouri, K. & T. Ry. Co.*, 6 I. C. C. 601; *Southern Pac. Ry. Co. v. Bartine*, 170 Fed. 725. Following the suggestion of the Supreme Court quoted in the text, the Commission has prescribed rules relating to the separation of expenses. *Separation of Operating Expenses*, 30 I. C. C. 676. For cases construing the powers of State Commissions generally, see, *Steenerson v. Great N. Ry. Co.*, 69 Minn. 353, 375, 376, 67 N. W. 207; *State v. Chicago, M. & St. P. Ry. Co.*, 38 Minn. 281, 298, 37 N. W. 782; *Foreman v. Board*, 64 Minn. 371, 67 N. W. 207; *State v. Young*, 29 Minn. 474, 9 N. W. 737; *Southern Pac. Co. v. R. R. Com. of Oregon, Ore.*, 119 Pac. 727; *Minneapolis, St. P. & S. Ste. M. R. Co. v. R. R. Com. of Wisconsin*, 136 Wis. 146, 116 N. W. 905; *Chicago, R. I. & P. Ry. Co. v. Railway Com.*, 85 Neb. 818, 824-5, 124 N. W. 477; *Spring Valley Water Works v. San Francisco*, 82 Cal. 286, 306, 22 Pac. 910, 1046; *Jacobson v. Wisconsin Ry. Co.*, 71 Minn. 519, 529, 74 N. W. 893; 40 L. R. A. 389, 70 Am. St. 358; *Morgan's L. & T. R. & S. S. Co. v. R. R. Com. of Louisiana*, 109 Ga. 247, 265, 33 So. 214; *In Re Amsterdam*, 33 N. Y. Supp. 1009; *People v. Board of R. R.*

ing the state of Arkansas have from data carefully obtained formulated rules which appear to be more nearly accurate than any previously published, and which rules were adopted by the trial court in an opinion holding that the Arkansas intrastate rates were confiscatory."<sup>294</sup>

The Interstate Commerce Commission requires carriers to make a separation of operating expense between freight and passenger service."<sup>295</sup>

**§ 50. Testing a Rate by Use to Determine Whether or Not It Is Confiscatory.**—Circuit Judge Woods, in 1881, first applied the test to a rate. What he there said applies with great force to a rate fixed by an administrative commission. He said."<sup>296</sup>

"The officers of the railroad company declares that the rates fixed by the commission will so reduce its income that it will not suffice to pay the running expenses of the road and the interest on its bonded debt, leaving nothing for dividends to its stockholders. The railroad commissioners assert that their schedule was framed to produce 8 per cent. income on the value of the road after paying cost of maintenance and running expenses. Which view is the correct one, it is impossible to decide from the evidence submitted. There is, however, a conclusive way, and it seems to me it is the only one, by which this controversy can be settled, and that is by experiment. A reduction of railroad charges is not always followed by a reduction of either gross or net income. It can soon be settled which is right—the railroad company's officers or the railroad commission—in their view of the effect of the commission's tariff of rates, by allowing the tariff to go into operation. If it turns out that the views of the railroad company are correct, and that the schedule fixed by the com-

Com'rs, 53 App. Div. 61; Pensacola & A. R. Co. v. State, 25 Fla. 310, 5 So. 833; Storrs v. Pensacola Ry. Co., 29 Fla. 617, 11 So. 226; State v. Seaboard A. L. Ry. Co., 48 Fla. 114, 150, 152, 37 So. 652, 658.

294. Boyle v. St. Louis & S. F.

R. Co., 222 Fed. 539; see also Sec. 47 *Supra*, and note 288.

295. Separation of Operating Expenses, 30 I. C. C. 676 and rules adopted by the Commission June 15, 1915.

296. Tilley v. Railroad Co., 5 Fed. 641, 662, 4 Woods 427.

mission is too low to afford a fair return upon the value of the road, the remedy is plain; for the law makes it the duty of the commissioners 'from time to time, and as often as circumstances may require, to change and revise said schedules.' "

This test was followed by District Judges McPherson and Newman and commended by Circuit Judge Shelby and by the Interstate Commerce Commission,<sup>297</sup> and the principle has been applied by the Supreme Court.<sup>298</sup> The Supreme Court, in the 1913 North Dakota case, referred to in note,<sup>299</sup> *supra*, gave as a reason for a test, "the great difficulty in the attempt to measure the reasonableness of charges by reference to the cost of transporting the particular class of freight concerned." On the second appeal of this case the result of this test is shown.<sup>300</sup>

Another reason for the test and why great care should be observed in enjoining an order fixing a rate is that the shipper can not be protected by a bond, should the lower rate be finally held valid. This is clearly and unanswerably shown by Circuit Judge Selby in the Alabama Rate cases,<sup>301</sup> where he says:

"It is argued that the injunction should be issued because the rights of the defendants and all interested are secured by bonds. It is true that the courts have held that the fact that

297. *St. Louis S. W. Ry. Co. v. Hadley*, 155 Fed. 220; *Cent. of Ga. Ry. Co. v. McLandon*, 157 Fed. 961, 978; *R. R. Com. of Alabama v. Cent. of Ga. Ry. Co.*, 170 Fed. 225, 232, 233; *Loftis v. Pullman Co.*, 19 I. C. C. 102; *City of Spokane v. Northern Pac. Ry. Co.*, 19 I. C. C. 162; see *Shepard v. Northern Pac. Ry. Co.*, 184 Fed. 765, 807; *Des Moines Gas case* quoted *supra*, sec. 46.

298. *Ex Parte Young*, 209 U. S. 123, 52 L. Ed. 714, 28 Sup. Ct. 441; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. 148; *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. Ed. 382, 29 Sup. Ct.

192; *Northern Pac. Ry. Co. v. North Dakota*, 216 U. S. 579, 54 L. Ed. 624, 30 Sup. Ct. 423, affirming *North Dakota v. Northern Pac. Ry. Co.*, 17 N. Dak. 223, 116 N. W. 92; *Louisville N. R. Co. v. Cumberland Tel. & Tel. Co.*, 225 U. S. 430, 56 L. Ed. 1151, 32 Sup. Ct. 741. The Supreme Court recognized the value of a two months test in *Rowland v. Boyle* 244 U. S. 106, 61 L. Ed. 1022, 37 Sup. Ct. 577.

299. *Nor. Pac. R. Co. v. North Dakota*, 236 U. S. 585, 59 L. Ed. 735, 35 Sup. Ct. 429.

300. *R. R. Com. of Ala. v. Cen. of Ga. R. Co.*, 170 Fed. 225, 232, 233.

the defendants' rights may be secured by bond is sometimes a sound reason, in cases where the final result is doubtful, for exercising judicial discretion in favor of granting the preliminary injunction. But that rule is not always controlling, and clearly it should not be applied in cases where the bond does not afford adequate protection. Here the bonds given are intended to secure innumerable passengers and shippers or consignees. It is not at all probable that the claims of the tenth of them, on breach of the bonds, would ever be presented, or, if presented, would be paid, and to enforce payment in the courts, unless those injured combined in their efforts, would cost more than the claim is worth. Those familiar with the Tift case know that the bond proved ineffectual as complete indemnity in that case, although the parties sought to be protected were large shippers of lumber. Tift et al. v. Southern Railway Company et al. (C. C.) 123 Fed. 789; Id., 10 I. C. C. 548; Id. (C. C.) 138 Fed. 753; Southern Railroad Company et al. v. Tift et al. (C. C. A.) 148 Fed. 1021; Id. 206 U. S. 428, 27 Sup. Ct. 709; 51 L. Ed. 1124; Tift et al. v. Southern Railway Company et al. (C. C.) 159 Fed. 555. Where the injunction is granted, the bonds should of course, be required, but the court can not safely exercise its discretion upon the theory that the bond in a case like this gives complete indemnity."

The fact that the railroad has voluntarily applied the test will not estop it from enjoining the rate where the test shows confiscation.<sup>301</sup>

§ 51. **Issuance of Stocks and Bonds.**—Because unfaithful financiers have caused to be issued stocks and bonds of public service corporations without adequate security and sometimes with the intention of using the proceeds for personal rather than corporate purposes, and because the amount of the corporate securities of such corporations is a fact to be considered in determining rates to be charged, a number of the states have passed laws regulating the issuance of stocks and bonds. Some of the reasons for such statutes are given by the

301. Love. v. Atchison, T. & S. C. C. A. 403, and note 251, *supra*.  
F. Ry. Co., 185 Fed. 321, 107

Court of Appeals of Maryland in this language:"

"That issue of stocks and bonds have been made fraudulently and palmed off on a credulous public to their ultimate serious loss is matter of common knowledge. Facts in relation to such issues, especially with regard to local public utilities, have been difficult, if not impossible, to obtain, leaving it to the stimulated imagination of some broker or syndicate who, actuated by a heavy commission to be realized by creating a market until such stock or bonds could be unloaded, have reaped a reward in dollars and cents at the cost of those who were induced to give full faith and credit to their representations. The legislatures of many states have therefore, through the media of public service commissions seen fit to establish a *quasi* guardianship over prospective investors."

These laws are valid in so far as they restrict the issuance of corporate securities to purposes authorized by the law of the corporation, and in so far as they restrict the issuance of such securities to the proper corporate purposes; but such laws do not empower the states or state commissions to assume the management of the business of the corporation to the exclusion of its directors. Such legislation, as was said by the Court of Appeals of New York, was not "designed to make the commissioners the financial managers of the corporation, or that it empowered them to substitute their judgment for that of the board of directors or stockholders of the corporation as to the wisdom of a transaction, but that it was designed to make the commissioners the guardians of the public by enabling them to prevent the issue of stock and bonds for other than the statutory purposes."

No state can regulate or prohibit the issuance of stock and bonds by an interstate railroad, when the stocks or bonds are issued against lines extending beyond the limits thereof. The power of the state being limited to bonds and stocks on property situated in the state. It would seem, however, that even as to these, a state might require the interstate railroad to give information as to such issue."

302. *Laird v. Baltimore & O. R. Co.*, 88 Atl. 348, 350, 121 Md. 193, H. Co. v. Stevens, 197 N. Y. 1, 90 N. E. 60.

303. *People ex rel. Delaware &* 304. *Laird v. Baltimore & O. R. Co.*, 88 Atl. 348, 121 Md. 193.

Acting on this principle and in accord with an able and exhaustive opinion of its special attorney, the Railroad Commission of Georgia refused to assume jurisdiction of the question of the issuance of bonds by the Atlantic Coast Line Railroad Company on its interstate lines.<sup>305</sup>

Section 20a added to the Interstate Commerce Act by Transportation Act 1920 gives the Commission authority over the issuance of securities. This is an occupancy of the field by Congress and excludes any regulation by the states which may affect interstate carriers in the issuance of their securities.

§ 52. **Long and Short Haul.**—The law of the state of Kentucky provided that it shall be unlawful for any person or corporation owning or operating a railroad in the state to charge or receive any greater compensation in the aggregate for the transportation of passengers or of property of like kind, under substantially similiar circumstances and conditions, for a shorter than for a longer distance, over the same line, in the same direction, the shorter being included in the longer distance.

The Kentucky court<sup>306</sup> having affirmed a judgment against the Louisville & Nashville Railroad Company for a violation of that law, an appeal was taken to the Supreme Court of the United States, where the decision of the Kentucky court was affirmed.<sup>307</sup> In this case both the long and short haul were within the state of Kentucky. In holding that the Kentucky law did not illegally affect interstate commerce, the court said:

“It is plain that the provision in question does not in terms embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the state, and the long and short distances mentioned are evidently distances upon the railroad line within the state. The particular case before us is one involving only the transportation of coal from one point in the state of Kentucky to another by a corporation of that state.

305. Report of Railroad Com. 51 S. W. 164, 1012, 106 Ky. 633. of Ga. 1912, p. 222, *et seq.*

307. Louisville & N. R. Co. v.

306. Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. Kentucky, 21 Ky. Law Rep. 232, Ed. 298, 22 Sup. Ct. 95.

"It may be that the enforcement of the state regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commerce power of the general government, to be unlawful, must be direct, and not the merely incidental effect of enforcing the police powers of a state."

In another case where the state court held that the law applied where the long haul was interstate commerce, the Supreme Court reversed the state court and held that the Kentucky law so construed was invalid. The court, Mr. Justice Peckham delivering the opinion (and Mr. Justice Brewer and Mr. Justice Gray, dissenting), said:<sup>308</sup>

"Congress does not directly or indirectly interfere with local rates by adopting their sum as the interstate rate.

"In the case at bar the state claims only to regulate its local rates by the standard of the interstate rate, and says the former shall be no higher than the latter, but the direct effect of that provision is, as we have seen, to regulate the interstate rate, for to do any interstate business at the local rate is impossible, and if so, it must give up its interstate business or else reduce the rate in proportion. That very result is a hindrance to, an interference with, and a regulation of, commerce between the states, carried on, though it may be, by only a single company."

In the Minnesota Rate Cases,<sup>309</sup> at pages 428 and 429, the Supreme Court reviewed the Kentucky decisions and held that the first case was not affected by the later or Eubanks case. The review of the two decisions concludes with this statement:

308. *Louisville & N. R. Co. v. Eubank*, 184 U. S. 27, 46 L. Ed. 416, 22 Sup. Ct. 277. See *Louisville & N. R. Co. v. Com. of Ky.*, 106 Ky. 633, 51 S. W. 164, 1012, 90 Am. St. Rep. 236, 183 U. S. 503, 46 L. Ed. 298, 22 Sup. Ct. 95; *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 58 L. Ed. 229, 34 Sup. Ct. 48, 51.

309. *Simpson, et al., R. R. Com. of Minnesota v. Shepard*, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729. See also *Chicago, B. & Q. R. Co. v. Anderson*, 72 Neb. 586, 101 N. W. 1019. For a full dis-

"The authority of the former decision upholding the state law, as applied to places all of which were within the state, was in no way impaired and the court fully recognized the power of the state to prescribe maximum charges for intrastate traffic although carried over an interstate road to points on the state line."

The reservation in this quotation has been applied and the right to recover damages for a violation of an absolute prohibition in state laws of a greater charge for the shorter hauls sustained by the Federal courts.<sup>310</sup>

§ 53. **Ferries.**—The Supreme Court quotes as a definition of an ordinary ferry the following:<sup>311</sup>

"A ferry is a continuation of the highway from one side of the water over which it passes to the other, and is for transportation of passengers or of travellers with their teams and vehicles and such other property as they may carry or have with them."

At page 468 the opinion distinguishes such a ferry from one used by a railroad as a means of transporting cars, passengers and freight. Whatever doubt there may have been on the subject of the right of regulation by a state of a railroad ferry across a stream which is the boundary between two states, has been set at rest by a recent decision of the Supreme Court. In this decision the court quotes the definition of "railroad" contained in the Act to Regulate Commerce,<sup>312</sup> and says:<sup>313</sup>

cussion of the general subject and of discrimination in general, see *McGrew v. Missouri Pac. Ry. Co.*, 230 Mo. 496, 132 S. W. 1076.

310. *Missouri Pac. R. Co. v. McGrew Coal Co.*, 244 U. S. 191, 61 L. Ed. 1075, 37 Sup. Ct. 518; *Sou. Pac. Co. v. California Adjustment Co.*, 237 Fed. 954, 150 C. C. A. 604.

311. *St. Clair County v. Interstate Transp. Co.*, 192 U. S. 454, 466, 48 L. Ed. 518, 24 Sup. Ct. 300, citing *Mayor of New York v. Starin*, 106 N. Y. 1, 12 N. E. 631; *Brodnax v. Bake*, 94 N. C. 675;

see also *Mayor of New York v. New England Transp. Co.*, 14 Blatch, 159, Fed. Cas. 10197.

312. *post*, Sec. 337.

313. *New York Cent. & H. R. R. Co. v. Board, etc., of Hudson County*, 227 U. S. 248, 263, 264, 57 L. Ed. 499, 33 Sup. Ct. 269, reversing same styled case. 76 N. J. Law 664, 74 Atl. 954. This case and the *St. Clair* case, note 262, *supra*, cites and discusses many authorities. To the same effect see *Port Richmond & B. P. F. Co. v. County of Hudson*, 234 U. S. 317, 58 L. Ed. 1330, 34

"The inclusion of railroad ferries within the text is so certain and so direct as to require nothing but a consideration of the text itself. Indeed, this inevitable conclusion is not disputed in the argument for the defendant in error, but it is insisted that as the text only embraces railroad ferries and the ordinances were expressly decided by the court below only to apply to persons other than railroad passengers, therefore the action by Congress does not extend to the subject embraced by the ordinances. But as all the business of the ferries between the two states was interstate commerce within the power of Congress to control and subject in any event to regulation by the state as long only as no action was taken by Congress, the result of the action by Congress leaves the subject, that is, the interstate commerce carried on by means of the ferries, free from control by the state. We think the argument by which it is sought to limit the operation of the act of Congress to certain elements only of the interstate commerce embraced in the business of ferriage from state to state is wanting in merit. In the absence of an express exclusion of some of the elements of interstate commerce entering into the ferriage, the assertion of power on the part of Congress must be treated as being coterminous with the authority over the subject as to which the purpose of Congress to take control was manifested."

While the language above was used with reference to a railroad ferry, it would seem to be board enough to include an ordinary ferry, and the law is that states have no greater power to regulate a ferry between two states than they have to regulate an interstate railroad.<sup>314</sup> Nor can a state close naviga-

Sup. Ct. 821; reversing same styled case, 82 N. J. L. 536, 82 Atl. 729.

314. See Gloucester Ferry Co. v. Penna., 114 U. S. 196, 29 L. Ed. 158, 5 Sup. Ct. 826; Covington Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. Ed. 962, 14 Sup. Ct. 1087; St. Clair County v. Interstate Transp. Co., 192 U. S. 454, 48 L. Ed. 518, 24 Sup. Ct. 300;

Lake Shore & M. S. Ry. Co. v. Ohio, 165 U. S. 365, 41 L. Ed. 747, 17 Sup. Ct. 357; United States v. Union Bridge Co., 143 Fed. 377, affirmed, 204 U. S. 364, 51 L. Ed. 523, 27 Sup. Ct. 367; Manigault v. S. M. Word & Co., 123 Fed. 707, affirmed, Manigault v. Springs, 199 U. S. 473, 50 L. Ed. 274, 26 Sup. Ct. 227.

tion."<sup>315</sup> Fish, sponges, oysters, etc., in local waters belong to the states and are subject to their control."<sup>316</sup>

A municipality, and by parity of reasoning a state, cannot lawfully require a Canadian corporation operating a ferry over a boundary stream lying between Canada and the state in which the municipality is located to take out a license and pay a fee as a condition precedent to receiving and landing passengers and property in said municipality."<sup>317</sup> The rates for ferriage between two ports in the same state may be regulated by the state, notwithstanding the transportation is over a course which traverses the open sea,<sup>318</sup> but a ferry across the Mississippi River between two States, the Circuit Court of Appeals in *Long v. Miller*, 262 Fed. 362 holds, is subject to regulation only by Congress.

§ 54. **Bridges.**—Bridges across a stream which is a boundary between two states accommodate interstate commerce, and like ferries, are included in the definition of railroads in the Act to Regulate Commerce."<sup>319</sup> The rules of law stated in the preceding section as applicable to ferries, apply equally to such bridges. There are, however, bridges across navigable streams which are wholly within the boundaries of a state. As to these, Mr. Justice Field said that the states had full power"<sup>320</sup> to regu-

315. *Levy v. United States*, 92 Fed. 344, 34 C. C. A. 392, reversed, *Levy v. United States*, 177 U. S. 621, 44 L. Ed. 914, 20 Sup. Ct. 797. holding that the evidence was insufficient to show that the waters were used in interstate commerce.

316. *The Abby Dodge*, 223 U. S. 166, 56 L. Ed. 390, 32 Sup. Ct. 310, and cases cited and discussed in the opinion.

317. *Sault Ste. Marie v. International Transit Co.*, 234 U. S. 333, 58 L. Ed. 1337, 34 Sup. Ct. 826

318. *Wilmington Trans. Co. v. R. R. Com. of Calif.*, 236 U. S.

151, 59 L. Ed. 508, 35 Sup. Ct. 276.

319. Note 263, *supra*.

320. *Cardwell v. American Bridge Co.*, 113 U. S. 205, 208, 209, 28 L. Ed. 959, 5 Sup. Ct. 423. See also *Wilson v. Blackbird Creek Marsh Co.*, 2 Pet., 27 U. S. 245, 7 L. Ed. 412; *Pennsylvania v. Wheeling Bridge Co.*, 13 How., 54 U. S. 518, 564, 14 L. Ed. 249; *Gilman v. Philadelphia*, 3 Wall., 70 U. S. 713, 18 L. Ed. 96; *Pound v. Turck*, 95 U. S. 459, 24 L. Ed. 525; *Escanaba Co. v. Chicago*, 107 U. S. 678, 27 L. Ed. 442, 2 Sup. Ct. 185; *Miller v. Mayor of New York*, 109 U. S. 285, 27 L. Ed. 971, 3 Sup. Ct. 270.

late within their limits matters of internal police, which embraces among other things the construction, repair and maintenance of roads and bridges, and the establishment of ferries; that the states are more likely to appreciate the importance of these means of internal communication and to provide for their proper management, than a government at a distance; and that, as to bridges over navigable streams, their power is subordinate to that of congress, as an act of the latter body is, by the Constitution, made the supreme law of the land; but that until Congress acts on the subject their power is plenary. When Congress acts directly with reference to the bridges authorized by the state, its will must control so far as may be necessary to secure the free navigation of the streams."

The same principle is announced by Mr. Justice Hughes in the Minnesota Rate cases, as follows:<sup>321</sup>

"A state is entitled to protect its coasts, to improve its harbors, bays and streams, and to construct dams and bridges across navigable rivers within its limits, unless there is conflict with some act of Congress. Plainly, in the case of dams and bridges, interference with the accustomed right of navigation may result. But this exercise of the important power to provide local improvements has not been regarded as constituting such a direct burden upon intercourse or interchange of traffic as to be repugnant to the federal authority in its dormant state."

Where, under authority of a state, a bridge has been erected over a navigable stream within the state, the owners having erected such bridge with full knowledge of the paramount authority of Congress cannot complain when, under authority of the federal government, such bridge is required to be removed as an obstruction to navigation.<sup>322</sup> Nor is this rule different

321. *Simpson v. Shepard*, 230 U. S. 352, 403, 58 L. Ed. 151, 33 Sup. Ct. 729, citing authorities.

322. *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. Ed. 523, 27 Sup. Ct. 367, followed in *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 54 L. Ed. 435, 30 Sup. Ct.

306. See also, *The Brig Aurora*, 7 Cranch, 11 U. S. 382, 3 L. Ed. 378; *Wayman v. Southard*, 10 Wheat. 23 U. S. 1, 6 L. Ed. 253; *Field v. Clark*, 143 U. S. 649, 36 L. Ed. 294, 12 Sup. Ct. 495; *C. W., etc., R. Co. v. Com'rs*, 1 Ohio St. 77; *Moers v. City of Reading*, 21 Pa. St. 188; *Locke's Appeal*,

when the bridge has been erected under authority of an Act of Congress."<sup>322</sup>

A state court may not compel the removal of a bridge over a navigable stream, such bridge being used in interstate commerce."<sup>323</sup>

§ 55. **Regulating Charges for Transportation by Water.**—The Act to Regulate Commerce applies,<sup>324</sup> "to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment,)" and since the enactment of the Panama Canal Act to interstate transportation by water.

There is a transportation service which is performed by vessels over inland waters wholly within one state. When this transportation service is open to all who apply therefor, that those engaged therein are common carriers is too well settled to justify extensive citation of authorities.<sup>325</sup> Being common car-

72 Pa. St. 491, 498; *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. Ed. 525, 24 Sup. Ct. 349; *Gibbons v. Ogden*, 9 Wheat. 22 U. S. 1, 6 L. Ed. 23; *Gibson v. United States*, 166 U. S. 269, 41 L. Ed. 996, 17 Sup. Ct. 578; *Scranton v. Wheeler*, 179 U. S. 141, 45 L. Ed. 126, 21 Sup. Ct. 48; *New Orleans Gas Light Co. v. Drainage Com.*, 197 U. S. 453, 49 L. Ed. 831, 25 Sup. Ct. 471; *Chicago, B. & Q. R. Co. v. Drainage Com'rs*, 200 U. S. 561, 50 L. Ed. 590, 26 Sup. Ct. 341; *West Chicago Street R. Co. v. Chicago*, 201 U. S. 506, 50 L. Ed. 845, 26 Sup. Ct. 518; *Dugan v. Bridge Co.*, 27 Pa. St. 303; *Cooke v. Boston & L. R. Co.*, 133 Mass. 185; *Lake Erie & W. R. Co. v. Cluggish*, 143 Ind. 347; *Lake Erie & W. R. Co. v. Smith*, 61 Fed. 885; *State of Indiana v. Lake Erie & W. R. Co.*, 83 Fed. 284, 287; *St. L. & I. M. & S. R.*

*Co. v. Taylor*, 210 U. S. 281, 52 L. Ed. 1061, 28 Sup. Ct. 610; *Northern Pac. R. Co. v. Duluth*, 208 U. S. 583, 52 L. Ed. 630, 28 Sup. Ct. 341.

323. *Hannibal Bridge Co. v. United States*, 221 U. S. 194, 55 L. Ed. 699, 31 Sup. Ct. 603. The rule as to bridges would apply to dams, *Wilson v. Black Bird Creek Marsh Co.*, 2 Pet., 27 U. S. 245, 7 L. Ed. 412; *Pound v. Turck*, 95 U. S. 459, 24 L. Ed. 525.

324. *Kansas City S. R. Co. v. K. W. Valley Drainage District*, 233 U. S. 75, 58 L. Ed. 837, 34 Sup. Ct. 564.

325. Sec. 335, *post*, and the power granted by the Panama Act, *post*, 377.

326. *Moses v. Bettes*, 4 Helsk. (Tenn.) 661, 13 Am. Rep. 1; *Propeller Niagara v. Cordes*, 21 How. 62 U. S. 7, 22, 23, 16 L. Ed. 41; *Brown v. Clayton*, 12 Ga. 564. In

riers, the rates on intrastate transportation to be charged by them are subject to the same regulation by the states as rates for transportation by railroads.

The Constitution of the United States extends the judicial power of the courts of the United States "to all cases of admiralty and maritime jurisdiction,"<sup>327</sup> and boats plying between points in the state are within this jurisdiction.<sup>328</sup> This, however, does not exclude the states from regulating rates on intrastate transportation, although the transportation may be by water.<sup>329</sup>

Hale v. New Jersey Navigation Co., 15 Conn. 539, 39 Am. Dec. 398, citing Judge Kent, the opinion classes inland carriers as "carriers by land or water."

327. Art. III. Sec. 2, Constitution United States.

328. The Belfast, 7 Wall., 74 U. S. 624, 19 L. Ed. 266; Aldrich v. Aetna Co., 8 Wall., 75 U. S. 491, 19 L. Ed. 473; Tucker on the Constitution, Sec. 370.

329. State legislation regulating or prescribing methods of regulating common carriers show in many states a legislative construction supporting the text. As some states have no navigable streams, their failure to refer to water transportation is only natural. *Alabama*: carrier includes doing business "over any navigable stream in whole or in any part within the state or partly by rail and partly by water; but nothing in this article shall be construed as a regulation of or interference with interstate commerce;" Code 1907, Sec. 5648. *Arizona* laws make no reference to water carriers; Sessions laws 1912, chap. 90. The same is true in *Arkansas*: Kirby's Digest 1904, Secs. 6002, 6280. *California*: "canal" companies are mentioned, and the Act includes

"every common carrier," and common carrier comprehends owners of "any vessels regularly engaged in the transportation of persons or property for compensation upon the waters of this state or upon the high seas, over regular routes between points in this state;" Stat. 1911, 1st Ex. Sess., Chap. 14. *Colorado*: No mention of water carriers; laws 1910, Sp. Sess., chap. 5. *Connecticut*: includes all "common carriers" though no specific reference is made to water carriers; Acts 1911, chap. 128. *Delaware*: has no commission. *Florida*: includes in the definition of common carriers, "all companies and any person or persons owning and operating steamships engaged in the transportation of freight or passengers from and to ports within this state; all companies and any person or persons owning and operating steamboats used in the transportation of freight or passengers upon the rivers or inland waters of this state;" Gen. Stat. 1906, chap. 5, Tit. 4, Div. 4. *Georgia*: "common carriers." No specific mention of water carriers: Code 1910, sec. 2660, et seq. *Idaho*: water carriers not named. *Illinois*: transportation by "rail or

There is nothing in the decision in *The Daniel Ball*<sup>330</sup> that militates against this rule. In that case, the commerce was inter-

330. *The Daniel Ball v. United States*, 10 Wall., 77 U. S. 557, 19 L. Ed. 999.

(29 Continued.)

water;" Revisal 1909, chap. 114, sec. 368. *Indiana*: no reference to water carriers; Acts 1907, chap. 241, sec. 18 *Iowa id.*; Laws 1907, chap. 98, sec. 1. *Kansas*: *id.*; Laws 1911, chap. 238. *Kentucky*: *id.*; Carroll's Stat. 1909, sec. 821, *et seq.* *Louisiana*: "steamboat and other water craft;" Stat. 1906, No. 36, sec. 1. *Maine*: No reference to water carriers; Revised Stat. 1903, chap. 1. *Maryland*: includes "steamboat, powerboat and vessel-boat and ferry companies, canal companies;" Laws 1910, chap. 180, sec. 1; Laird v. Baltimore & O. R. Co., 121 Md. 193, 88 Atl. 348. *Massachusetts*: same power over steamship companies as railroads; Acts 1906, chap. 413, pt. 1, sec. 6. *Michigan*: "wholly by rail or partly by rail and partly by water;" Pub. Acts 1909, No. 300, sec. 3. *Minnesota*: *id.*; Rev. Laws 1905, chap. 28, sec. 1953. *Mississippi*: no mention of water carriers; Const., Art. 7, secs. 184, 195; Laws 1908, chap. 82, sec. 1. *Missouri*: *id.*; Acts 1909, secs. 3189, 3251, 3252. *Montana*: *id.*; Rev. Codes 1907, secs. 4373, 4375. *Nebraska*: *id.*; Stat. 1907, Sec. 10650 (b). *Nevada*: "wholly by rail or partly by rail and partly by water." *New Hampshire*: "all common carriers;" public utilities, includes ferry and toll bridges; Laws 1909, chap. 126, sec. 1; Laws 1911, chap. 164, sec. 1

*New Jersey*: canal companies; Laws 1911, chap. 195, sec. 15. *New Mexico*: no mention of water carriers; Const., Art. XI, sec. 7. *New York*: common carriers; no specific mention of water carriers; Laws 1910, chap. 480, sec. 2. *North Carolina*: all common carriers, steamboat companies mentioned; Const., Art. VII, sec. 142; Pell's Revisal 1908, sec. 1094 (2), 1099. *Ohio*: "wholly by rail or partly by rail and partly by water or wholly by water;" Code 1910, sec. 502; Laws 1911, No. 325, sec. 1. *Oklahoma*: "canal, steamboat line;" Const., Art. IX, sec. 34. *Oregon*: "wholly by rail or partly by rail and partly by water;" Gen. Laws 1907, chap. 53, sec. 11. *Pennsylvania*: "by water or partly by railroad and partly by water;" Laws 1907, No. 250, sec. 6. *Rhode Island*: "steamboat, powerboat and ferry companies;" Acts 1912, chap. 795, sec. 2. *South Carolina*: "railroad companies;" Gen. Stat. 1902, sec. 2082; Const., Art. IX, sec. 14. *South Dakota*: no mention of water carriers; Rev. Pol. Code 1903, secs. 431, 450; Laws 1911, chap. 207, secs. 1, *et seq.* *Tennessee*: no mention of water carriers; Laws 1897, chap. 10, sec. 3; Acts 1907, chap. 390. *Texas*: *id.*; Sayles' Civ. Stats. 1897, Art. 4562, *et seq.* *Utah*: no commission. *Vermont*: no mention of water carriers; Pub. Stat. 1906,

state and the language of the opinion must be construed with reference to that fact, and Mr. Justice Field, in the course of the opinion, was careful to say that there was an intrastate commerce over which Congress had no control. He said:—

“There is undoubtedly an internal commerce which is subject to the control of the states. The power delegated to Congress is limited to commerce ‘among the several states,’ with foreign nations, and with the Indian tribes. This limitation necessarily excludes from federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a state, and does not extend to or affect other states.”

§ 56. **Regulating Pilotage, Ports, Harbors and Vessels.**—Al-

331. The *Daniel Ball* is cited in the Minnesota Rate Cases (*Simpson v. Shepard*, 230 U. S. 352, 399), and the location in the opinion of the citation indicates that the decision was considered by Mr. Justice Hughes as not excluding intrastate commerce. For a further discussion of the case see sec. 67, *post*. The question of the jurisdiction of the federal courts under the constitutional provision quoted in the text is not involved in fixing a rate. As to jurisdiction, see *The Belfast*, 7 Wall., 74 U. S. 624, 19 L. Ed. 266; *The Robert W. Parsons*, 191 U. S. 17, 35, 48 L. Ed. 73, 24 Sup. Ct. 8. See as to

whether commerce is interstate or intrastate, citing *The Daniel Ball*, *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 95, 47 L. Ed. 394, 23 Sup. Ct. 266; *Pennsylvania R. Co., State of New York ex rel. v. Knight*, 192 U. S. 21, 27, 48 L. Ed. 325, 24 Sup. Ct. 202; and *Wilmington Transp. Co. v. R. R. Com. of Cal.*, 236 U. S. 151, 59 L. Ed. 508, 35 Sup. Ct. 276. An ordinance fixing a rate of speed for boats in the Chicago river, was held not to interfere with the rights of navigation or with interstate commerce, *Canada Atlantic Transit Co. v. City of Chicago*, 210 Fed. 7, 125 C. C. A. 587.

(29 Continued.)

sec. 4602. *Virginia*: “canal, steamboat or steamship line;” Const., sec. 153. *Washington*: “steamboat companies;” Laws 1911, chap. 117, sec. 8. *West Virginia*: no commission. *Wisconsin*: “wholly by rail or partly by rail and partly by water;” Laws 1905, chap. 362, sec. 2; Amended Laws 1907, chap. 582.

*Wyoming*: no commission. The foregoing references to state laws relating to regulation of common carriers are inserted to show where specific statements are made giving power to regulate water carriers. The full extent of the power to regulate is not attempted to be set forth.

though state laws concerning pilotage are regulations of commerce, such laws fall within that class of powers which may be exercised by the states until Congress shall see fit to act.

The first act of Congress on the subject left this right in the states and, although there have been other acts of Congress relating to pilots, there is yet power in the states to make regulations concerning pilots in their domestic ports.

A law of California requiring certain vessels entering and departing from her ports to take on a resident bar pilot was held valid by the Supreme Court for the reason that the law did not conflict with any federal statute or regulation, although the federal power to regulate was stated to be "unquestioned."<sup>332</sup>

A Louisiana statute prohibiting other than a duly licensed pilot from piloting vessels on the Mississippi river within the borders of the state was held to be a valid law.<sup>333</sup>

While states may establish harbor lines on navigable waters, such lines have no permanent force as against the will of Congress and, therefore, Congressional action supersedes prior state action.<sup>334</sup>

A law of the state of Alabama requiring the owners of steamboats navigating the waters of the state to file with a state officer certain information relating to the ownership of the boat and residence of the owners was held void, in so far as the law was brought to bear upon a vessel engaged in interstate commerce and licensed and enrolled under the Act of Congress for conducting the coasting trade.<sup>335</sup> In this case, Mr. Justice Nelson stated the applicable principle as follows:

332. *Anderson v. Pacific C. S. Co.*, 225 U. S. 187, 56 L. Ed. 1047, 32 Sup. Ct. 526, citing authorities, stating and giving the history of the federal laws on the subject. See also *Cooley v. Board of Wardens*, 12 How., 53 U. S. 299, 13 L. Ed. 996. *The Queen*, 206 Fed. 148, 124 C. C. A. 214, reversing same styled case, 184 Fed. 537.

333. *State v. Leech*, 119 La. 522, 44 So. 285, 129 Am. St. Rep. 336; *Leech v. Louisiana*, 214 U. S.

175, 53 L. Ed. 956, 29 Sup. Ct. 552.

334. *Philadelphia Co. v. Stimson*, Secy. of War, 223 U. S. 605, 56 L. Ed. 570, 32 Sup. Ct. 340.

335. *Sinnot v. Davenport*, 22 How., 63 U. S. 227, 16 L. Ed. 243; *Foster v. Davenport*, 22 How., 63 U. S. 244, 16 L. Ed. 248. For further statement of the principle controlling the questions discussed in the text and for citation of authorities see, *Simpson v. Shepard*, 230 U.

"The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, are therefore but the exercise of an undisputed power. When, therefore, an act of the Legislature of a state prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the state law must give way; and this, without regard to the source of power whence the state Legislature derived its enactment.

"This paramount authority of the act of Congress is not only conferred by the Constitution itself, but is the logical result of the power over the subject conferred upon that body by the states. They surrender this power to the General Government; and to the extent of the fair exercise of it by Congress, the act must be supreme.

"The power of Congress, however, over the subject does not extend further than the regulation of commerce with foreign nations and among the several states. Beyond these limits the states have not surrendered their power over the subject, and may exercise it independently of any control or interference of the General Government."

Wharfage charges and tolls for the use of artificial facilities may be exacted "where Congress has not acted," although the payment is required of those engaged in interstate or foreign commerce;<sup>336</sup> and states may by statute give a lien upon all vessels, whether domestic or foreign and whether engaged in interstate or intrastate commerce, for injuries committed to persons and property within the state, and the statute may

S. 352, 403, 57 L. Ed. 1511, 33 Sup. Ct. 729; and holding that tugs used in lightering vessels engaged in interstate commerce were themselves instrumentalities of interstate commerce, see *United States v. Great Lakes Towing Co.*, 208 Fed. 733, 217 Fed. 657.

336. *Simpson v. Shepard*, 230 U. S. 352, 405, 57 L. Ed. 1511, 33 Sup. Ct. 729; *Keokuk Packet Co. v. Keokuk*, 95 U. S. 80, 24 L.

Ed. 377; *Cincinnati, etc., Packet Co. v. Cattletsburg*, 105 U. S. 559, 26 L. Ed. 1169; *Parkersburg & O. R. T. Co. v. Parkersburg*, 107 U. S. 691, 27 L. Ed. 584, 2 Sup. Ct. 732; *Huse v. Glover*, 119 U. S. 543, 30 L. Ed. 487, 7 Sup. Ct. 313; *Ouachita Packet Co. v. Aiken*, 121 U. S. 444, 30 L. Ed. 976, 7 Sup. Ct. 907; *Sands v. Manistee River Improvement Co.*, 123 U. S. 288, 295, 31 L. Ed. 149, 8 Sup. Ct. 113.

provide that for non-maritime torts, relief may be had in the state courts.<sup>337</sup>

§ 57. **Boards of Trade and Exchanges.**—A statute of the state of Missouri provided among other things that it should be “unlawful for any corporation, association, copartnership or person to keep, or cause to be kept, in this state, any office, store or other place wherein is permitted the buying or selling the shares of stocks or bonds of any corporation or petroleum, cotton, grain, provisions or other commodities, either on margins or otherwise, where the same is not at the time actually paid for and delivered, without at the time of the sale the seller shall cause to be made a complete record of the thing sold, the purchaser and the time of delivery in a book kept for that purpose; and at the time the seller shall deliver to the purchaser a written or printed memorandum of said sale, on which he shall place, or cause to be placed, a stamp of the value of twenty-five cents.” It was urged that this law was invalid because it affected sales of grain, provisions and other commodities which were at the time of sale in the course of transportation in interstate commerce. The Supreme Court held that the statute related to the place of sale and did not interfere with interstate commerce.<sup>338</sup>

§ 58. **Inspection—Quarantine, Game, Food, Liquor and Lottery Laws.**—“State inspection laws and statutes designed to safeguard the inhabitants of a state from fraud and imposition are valid when reasonable in their requirements and not in conflict with federal statutes, although they may affect interstate commerce in their relation to articles prepared for export or by including incidentally those brought into the state and held for sale in the original imported packages.”<sup>339</sup>

337. *Martin v. Mest*, 222 U. S. 191, 56 L. Ed. 159, 32 Sup. Ct. 42, 36 L. R. A. (N. S.) 592; *Johnson v. Chicago & P. Elevator Co.*, 119 U. S. 388, 400, 30 L. Ed. 447, 7 Sup. Ct. 509; *Davis v. Cleveland, C. C. & St. L. Ry. Co.*, 217 U. S. 157, 179, 54 L. Ed. 708, 30 Sup. Ct. 463.

338. *Brodnax v. Missouri*, 219 U. S. 285, 55 L. Ed. 219, 31 Sup. Ct. 238, affirming *State v. Brod-*

*nax*, 228 Mo. 225, 128 S. W. 177, 137 Am. St. Rep. 613. See also *Hatch v. Reardon*, 204 U. S. 152, 51 L. Ed. 415, 27 Sup. Ct. 188, and *House v. Mayes*, 219 U. S. 270, 55 L. Ed. 213, 31 Sup. Ct. 234.

339. *Simpson v. Shepard*, 230 U. S. 352, 408, 57 L. Ed. 1511, 33 Sup. Ct. 729, 744; *Red “C” Oil Co. v. North Carolina*, 222 U. S. 380, 56 L. Ed. 240, 32 Sup. Ct.

"And for the protection of its game and the preservation of a valuable food supply, the state may penalize the possession of game during the closed season whether obtained within the state or brought from abroad."<sup>340</sup>

Statutes of this nature, however, must not directly affect interstate commerce and must not, under the guise of an inspection fee, be a tax on such commerce.<sup>341</sup>

The subject affects only incidentally the questions discussed in this chapter, and it is not within the purview of this book to treat of the subject of interstate commerce except as affecting carriers. Food and liquors are commodities, and it has been held that a lottery ticket is a commodity in such a sense that its transportation is commerce. In a note are given decisions which illustrate the holding of the courts showing the extent of the police power of the states.<sup>342</sup>

152, affirming *Red "C" Oil Co. v. Board of Agriculture*, 172 Fed. 695; *Patapsco Guano Co. v. North Carolina*, 171 U. S. 345, 43 L. Ed. 191, 18 Sup. Ct. 862.

340. *Simpson v. Shepard*, 230 U. S. 352, 408, 57 L. Ed. 1511, 33 Sup. Ct. 724, 744; *Silz v. Hesterberg*, 211 U. S. 31, 53 L. Ed. 75, 29 Sup. Ct. 10; *Geer v. Connecticut*, 161 U. S. 519, 40 L. Ed. 793, 16 Sup. Ct. 600; *Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co.*, 155 Ind. 547, 58 N. E. 706, 53 L. R. A. 135; *Adams v. Mississippi Lumber Co.*, 84 Miss. 29, 36 So. 68; *Re Deininger*, 108 Fed. 623; *McDonald v. Southern Exp. Co.*, 134 Fed. 284; *State v. Mallory*, 73 Ark. 249, 83 S. W. 955, 67 L. R. A. 778; *State v. Harbourne*, 70 Conn. 492; 40 Atl. 179, 66 Am. St. Rep. 126, 40 L. R. A. 610; *Westheimer v. Weisman*, 8 Kan. App. 78, 54 Pac. 332; *People v. O'Neill* 110 Mich. 328, 88 W. 227, 33 L. R. A. 697; *Selkirk v. Stephens*, 72 Minn. 336, 75 N. W. 386, 40 L. R. A. 760; *Ames*

*v. Kirby*, 71 N. J. L. 446, 59 Atl. 558; *People v. A Booth & Co.*, 42 Misc. 327, 86 N. Y. Supp. 272; *People v. Buffalo Fish Co.*, 164 N. Y. 105, 58 N. E. 34, 79 Am. St. Rep. 622, 52 L. R. A. 807; *People v. Bootman*, 180 N. Y. 9, 72 N. E. 505.

341. Note 291 *supra*; *Savage v. Jones*, 225 U. S. 501, 56 L. Ed. 1182, 32 Sup. Ct. 715; *McLean v. Denver & R. G. R. Co.*, 203 U. S. 38, 51 L. Ed. 78, 27 Sup. Ct. 1; *New Mexico v. Denver & R. G. R. Co.*, 12 N. M. 425, 78 Pac. 74.

342. *Quarantine Laws*: *Reid v. Colorado*, 187 U. S. 138, 47 L. Ed. 108, 23 Sup. Ct. 92; *Asbell v. Kansas*, 209 U. S. 251, 52 L. Ed. 778, 28 Sup. Ct. 485, 14 Ann. Cas. 1101; *United States v. Baltimore & O. S. W. R. Co.*, 222 U. S. 8, 56 L. Ed. 68, 32 Sup. Ct. 6; *Minnesota v. Barber*, 136 U. S. 313, 34 L. Ed. 455, 10 Sup. Ct. 862; *Simpson v. Shepard*, 230 U. S. 352, 406, 57 L. Ed. 1511, 33 Sup. Ct. 729; *Morgan's S. S. Co. v. Louisiana*, 118

## § 59. Taxation, Including License Taxes.—The states may

U. S. 455, 30 L. Ed. 237, 6 Sup. Ct. 1114; *Missouri, K. & T. Ry. Co. v. Haber*, 169 U. S. 613, 42 L. Ed. 878, 18 Sup. Ct. 488; *Louisiana v. Texas*, 176 U. S. 1, 44 L. Ed. 347, 20 Sup. Ct. 251; *Rasmussen v. Idaho*, 181 U. S. 198, 45 L. Ed. 820, 21 Sup. Ct. 594; *Compagnie Francaise, etc. v. Board of Health*, 186 U. S. 380, 46 L. Ed. 1209, 22 Sup. Ct. 811; *Midland Valley R. Co. v. State*, 35 Okla. 672, 130 Pac. 803. Such laws, however, can not be made a cover for discriminations and arbitrary enactments having no reasonable relation to health, *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 472, 473, 24 L. Ed. 527. *Pure Food: McDermott v. Wisconsin*, 223 U. S. 115, 57 L. Ed. 754, 33 Sup. Ct. 431, reversing same case, 143 Wis. 18, 126 Mo. 888, 21 Am. Cas. 1315; *Texas & P. Ry. Co. v. Abilene Cot Oil. Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350, 9 Am. Cas. 1075; *Northern Pac. Ry. Co. v. Washington*, 222 U. S. 370, 56 L. Ed. 237, 32 Sup. Ct. 160; *Southern Ry. Co. v. Reid*, 222 U. S. 424, 56 L. Ed. 257, 32 Sup. Ct. 140; *Second Employers' Liability cases*, *Mondou v. N. Y. N. H. & H. R. Co.*, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 38 L. R. A. (N. S.) 44; *Savage v. Jones*, 225 U. S. 501, 56 L. Ed. 1182, 32 Sup. Ct. 715; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 55 L. Ed. 364, 31 Sup. Ct. 364. construing federal statute. *Laws of Congress supreme*, *Sligh v. Kirkwood*, 237 U. S. 52, 59 L. Ed. 835, 35 Sup. Ct. 501. False statements of the curative effects of a drug violates Federal Pure Food Laws. *United States v. Six Cases*, 239 U. S. 510, 60 L. Ed. 411, 36 Sup. Ct. 190. So of a food. *Weeks v. United States*, 245 U. S. 618, 62 L. Ed. 513, 38 Sij. Cit. 219. Federal Law Supreme, *Crescent Mfg. Co. v. Wilson*, 233 Fed. 282. packages imported to state in interstate or foreign commerce not subject to prohibitory laws of state, *Leisy v. Hardin*, 135 U. S. 100, 34 L. Ed. 128, 10 Sup. Ct. 681. See application of principle, *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465, 31 L. Ed. 700, 8 Sup. Ct. 689; *Rhodes v. Iowa*, 170 U. S. 412, 42 L. Ed. 1088, 18 Sup. Ct. 664; *Vance v. Vandercook Co.*, 170 U. S. 438, 42 L. Ed. 1100, 18 Sup. Ct. 674; *Scott v. Donald*, 165 U. S. 58, 95 41 L. Ed. 632, 17 Sup. Ct. 265; *May v. New Orleans*, 178 U. S. 496, 44 L. Ed. 1165, 20 Sup. Ct. 976; *Austin v. Tennessee*, 179 U. S. 343, 45 L. Ed. 224, 21 Sup. Ct. 132; *American Exp. Co. v. Iowa*, 196 U. S. 133, 49 L. Ed. 417, 25 Sup. Ct. 182; *Cook v. Marshall County, Iowa*, 196 U. S. 261, 49 L. Ed. 471, 25 Sup. Ct. 233; *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, 49 L. Ed. 925, 25 Sup. Ct. 552; *Heyman v. Southern Ry. Co.*, 203 U. S. 270, 51 L. Ed. 178, 27 Sup. Ct. 104; *Rearick v. Pennsylvania*, 203 U. S. 507, 51 L. Ed. 295, 27 Sup. Ct. 159; *Adams Exp. Co. v. Kentucky*, 206 U. S. 129, 51 L. Ed. 987, 27 Sup. Ct. 606; *Adams Exp. Co. v. Kentucky*, 214 U. S. 218, 53 L. Ed. 972, 29 Sup. Ct. 633, con-

not burden interstate commerce by taxing the business nor

struing Wilson Act of Aug. 8, 1890, chap. 728, 26 Stat. 313; *Ex Parte Oklahoma*, 220 U. S. 191, 55 L. Ed. 431, 31 Sup. Ct. 426, dispensary law. *Louisville & N. R. Co. v. Cook Brewing Co.*, 223 U. S. 70, 56 L. Ed. 355, 32 Sup. Ct. 189 affirming same case, 172 Fed. 117, 96 C. C. A. 322, 40 L. R. A. 798, and holding that a railroad will be enjoined from refusing beer for shipment in interstate commerce, even though the shipment is to a prohibition district. *Purity Extract Co. v. Lynch*, 226 U. S. 192, 57 L. Ed. 84, 33 Sup. Ct. 44, discussing effect of Wilson Act and affirming *Purity Extract Co. v. Lynch*, 100 Miss. 650, 56 So. 316. *De Bary v. Louisiana*, 227 U. S. 108, 57 L. Ed. 441, 33 Sup. Ct. 739. affirming *State v. Fredrick De Bary & Co.*, 130 La. 1090, 58 So. 892; *McDermott v. Wisconsin*, 228 U. S. 115, 134, 57 L. Ed. 754, 33 Sup. Ct. 431, discussing the meaning of 'original package,' and reversing *McDermott v. State*, 143 Wis. 18, 126 N. W. 888; *State v. Intoxicating Liquors*, 104 Me. 502, 71 Atl. 758; *State v. 18 Casks of beer*, 24 Okla. 786, 104 Pac. 1093; *American Exp. Co. v. Miller*, 104 Miss. 247, 61 So. 306, 45 L. R. A. (N. S.) 120; *Crescent Brewing Co. v. Oregon S. L. R. Co.*, 24 Idaho 106, 132 Pac. 975; *Kirkpatrick v. State*, 138 Ga. 794, 76 S. E. 53; *State v. Miller*, 66 W. Va. 436, 66 S. E. 522. By Act of Congress passed over the President's veto by the Senate February 28, 1913, and by the House March 1, 1913, known as the Webb-Kenyon Act, it was en-

acted,—“That The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquors is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.” Appendix N. *post*. For discussion on this Act see *Atkinson v. Southern Exp. Co.*, 94 S. C. 444, 78 S. E. 516, 48 L. R. A. (N. S.) 349; *Atkinson v. Southern Exp. Co.*, 94 S. C. 457, 78 S. E. 520; *Adams Exp. Co. v. Commonwealth*, 154 Ky. 462, 157 S. W. 908, 48 L. R. A. (N. S.) 342; *State v. Grier*, 88 Atl. 579; *United States v. Oregon & W. R. & Nav. Co.*, 210 Fed. 378. War time prohibition valid. *Hamilton v. Kentucky Distilleries and Warehouse co.*, 251 U. S. —, 64 L. Ed. —; 40 Sup. Ct. —. Transportation by automobile violates Reed Amendment. *United States v. Simpson* 252 U. S. —, 64 L. Ed. —, 40 Sup. Ct. —.

by taxing the receipts of such commerce."<sup>33</sup> But the fact that a corporation is engaged in interstate commerce does not exempt its property located in a state from taxation by the state."<sup>34</sup> "It is the commerce itself which must not be bur-

*Lotteries:* Carriage of Lottery tickets by a common carrier in interstate commerce may be prohibited by Congress, *Lottery case, Champion v. Ames*, 188 U. S. 321, 47 L. Ed. 492, 23 Sup. Ct. 321. See also, *Francis v. United States*, 188 U. S. 375, 47 L. Ed. 510, 23 Sup. Ct. 334; *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. Ed. 679, 24 Sup. Ct. 436; *United States v. Northern Seagley* 59. 26387. *Templeton Securities Co.*, 120 Fed. 721; *United States v. Whelpley*, 125 Fed. 617; *State v. Lowry (Ind.)*, 166 Ind. 372, 77 N. E. 728, 4 L. R. A. (N. S.) 532; *People v. A. Booth & Co.*, 42 Misc. 331, 86 N. Y. Supp. 272; *Re Gregory*, 219 U. S. 210, 55 L. Ed. 184, 31 Sup. Ct. 143. For a discussion by the Supreme Court of the principles of the text and citing authorities, see *Sligh v. Kirkwood*, 237 U. S. 52, 59 L. Ed. 835, 35 Sup. Ct. 501. *Blue Sky Law* held invalid, *Alabama & N. O. Transp. Co. v. Doyle*, 210 Fed. 173; *Compton v. Allen*, 216 Fed. 537; citing cases. *State Blue Sky Laws* valid prior to Congressional action. *Merrick v. Halsey & Co.* 242 U. S. 568, 61 L. Ed. 498, 37 Sup. Ct. 227; *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 61 L. Ed. 480, 37 Sup. Ct. 217; *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U. S. 559, 61 L. Ed. 493, 37 Sup. Ct. 224. *Inspection Laws.* Oyster inspection law held invalid as an interference

with interstate commerce. *Foot v. Stanley*, 232 U. S. 494, 58 L. Ed. 698, 34 Sup. Ct. 377; peddler's license law invalid, *Stewart v. Michigan*, 232 U. S. 665, 58 L. Ed. 786, 34 Sup. Ct. 476. An additional tax on sales where profit sharing coupons are given is valid. *Rast v. Van Deman & Lewis Company*, 240 U. S. 342, 60 L. Ed. 679, 36 Sup. Ct. 370. *Migratory Bird Law.* State statute not in conflict with Federal statutes. *Carey v. South Dakota*, 250 U. S. —, 63 L. Ed. —, 39 Sup. Ct. —. Federal statute invalid, *United States v. McCullagh*, 221 Fed. 288.

343. *Galveston, H. & S. A. Ry. Co. v. Texas*, 210 U. S. 217, 52 L. Ed. 1031, 28 Sup. Ct. 638; *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 54 L. Ed. 355, 30 Sup. Ct. 190; *Pullman Co. v. Kansas*, 216 U. S. 56, 54 L. Ed. 378, 30 Sup. Ct. 282; *Minnesota Rate Cases*, 230 U. S. 352, 400, 57 L. Ed. 1511, 33 Sup. Ct. 729, and previous cases therein cited

344. *United States Express Co. v. Minnesota*, 223 U. S. 335, 56 L. Ed. 459, 32 Sup. Ct. 211; *Kansas City M. & B. R. Co. v. Stiles*, 242 U. S. 111, 61 L. Ed. 176, 37 Sup. Ct. 58; *International Paper Company v. Massachusetts*, 246 U. S. 135, 62 L. Ed. 624, 38 Sup. Ct. 292; *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147, 62 L. Ed. 632, 38 Sup. Ct. 295; *Locomotive Co. v. Massachusetts*, 246 U. S. 146, 62 L. Ed. 631, 38 Sup. Ct. 298.

dened by state exactions which interfere with the exclusive federal authority over it. A resort to the receipts of property or capital employed in part at least in interstate commerce, when such receipts or capital are not taxed as such but are taken as a mere measure of a tax of lawful authority within the state, has been sustained."<sup>345</sup>

States may not regulate interstate commerce, nor may they prohibit such commerce. They can, subject to this limitation, prohibit a foreign corporation from doing business in the state, although a state "may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law, or you may transact business in intrastate commerce subject to the regulatory power of the state. To allow a state to exercise such authority would permit it to deprive of fundamental rights those entitled to the protection of the Constitution in every part of the Union."

These general principles are stated and cases cited by Mr. Justice Day in *Baltic Mining Co. v. Massachusetts*, note 343, *supra*.

Charging a license fee to automobiles using the roads of a state is analogous to levying a tax, and in the absence of Congressional action it is legal to charge such fee even as to automobiles moving in interstate commerce."<sup>346</sup>

#### § 60. Procedure to Test the Validity of State Regulations.

—Neither the act of a state legislature nor the order of a

345. *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 83, 58 L. Ed. 127, 34 Sup. Ct. 15, affirming *Baltic Mining Co. v. Commonwealth*, 207 Mass. 381, 93 N. E. 831, Am. Cas. 1913 C. 805; *S. S. White Dental Mfg. Co. v. Commonwealth*, 212 Mass. 25, 98 N. E. 1056, 28 Am. & E. Ann. Cas. 805; *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 35 L. Ed. 994, 12 Sup. Ct. 121; *Provident Institution v. Massachusetts*, 6 Wall., 73 U. S. 632, 18 L. Ed. 904; *Flint v. Stone-Tracy Co.*, 220 U. S. 107, 162-5, 55 L. Ed. 389, 31 Sup. Ct. 342; *United States Exp. Co. v. Minnesota*, 233 U. S. 335, 56 L. Ed. 459, 32 Sup. Ct. 211. See also *Ohio R. & W. R. Co. v. Dittey*, 232 U. S. 576, 58 L. Ed. 737, 34 Sup. Ct. 372, affirming same styled case, 203 Fed. 537. *Armour & Company v. Virginia*, 246 U. S. 1, 62 L. Ed. 547, 38 Sup. Ct. 267.
346. See Sec. 58, *supra*, and notes, and *Hendrick v. Maryland*, 235 U. S. 610, 59 L. Ed. 385, 35 Sup. Ct. 140 and cases cited;

state administrative body can be final and conclusive as to what are equal and reasonable charges, rules and regulations. The carrier is entitled to have a judicial hearing as to the reasonableness of such rates, rules and regulations."<sup>347</sup> Making rates and prescribing regulations for the government of carriers for the future is, however, a legislative act,<sup>348</sup> and courts may not set aside such rates or regulations unless they violate the constitutional rights of the carrier.<sup>349</sup>

When it is sought to avoid a rate or other requirement made by a state or under its authority, in the absence of a prescribed method of procedure, the carrier affected may resort to a court of equity and ask for appropriate relief. The court resorted to may be a state court, or when diverse citizenship exists or a Federal question is involved, the United States District Court. On this subject, Mr. Justice Field said:<sup>350</sup>

"Nor can it be said in such a case that relief is obtainable only in the courts of the state. For it may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts."

If resort be had to a District Court of the United States, and application for an interlocutory injunction is presented, the hearing must be had before three Judges "of whom at

Kane v. New Jersey, 242 U. S. 160, 61 L. Ed. 222, 37 Sup. Ct. 30.

347. Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462.

348. Prentis v. Atlantic C. L. R. Co., 211 U. S. 210, 53 L. Ed. 150, 29 Sup. Ct. 67.

349. Sec. 47, *supra*; Trenton & M. C. Traction Co. v. New Jersey Public Utility Comr's., 229 Fed. 140; Ann Arbor R. Co. v. Fellows, 236 Fed. 387.

350. Reagan v. Farmers L. & T. Co., 154 U. S. 362, 391, 38 L. Ed. 1014, 14 Sup. Ct. 1047:

least one shall be a Justice of the Supreme Court or a Circuit Judge," and a direct appeal may be taken to the Supreme Court of the United States from an order granting or denying after notice and hearing an interlocutory injunction."<sup>351</sup>

A state officer whose duty it is to enforce the statute or administrative regulation claimed to be invalid, is a proper party to a proceeding for injunction."<sup>352</sup>

Some states provide for a review of the action of their Commissions, and when there is such provision a suit for injunction should not be commenced until the rate or regulation has been fixed by the body having the last word."<sup>353</sup>

Suit may be filed by the states for penalties or mandamus may be brought to compel obedience to the orders of the state regulating body."<sup>354</sup> To such suits defense may be made and, where a right claimed under the Constitution or laws of the United States is denied, "and the decision is against the title, right, privilege or immunity especially set up or claimed," ultimate appeal may be taken to the Supreme Court of the United States."<sup>355</sup>

Platt v. Lecocq, 158 Fed. 723, 85 C. C. A. 621, where Judge Sanborn says: "Rights created and remedies provided by the statutes of a state to be pursued in the state courts may be enforced and administered in the national courts, either at law or in equity as the nature of the rights and remedies may require. "A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality." Davis v. Gray, 16 Wall 83 U. S. 203, 21 L. Ed. 447; Darragh v. H. Wetter Mfg. Co., 23 C. C. A. 609, 617, 78 Fed. 7, 14; National Surety Co. v. State Bank, 56 C. C. A. 657, 667,

120 Fed. 593, 603, 61 L. R. A. 394; Barber Asphalt Co. v. Morris, 66 C. C. A. 55, 59, 132 Fed. 945, 949, 67 L. R. A. 761."

351. Judicial Code, sec. 266, amended by Act. Mar. 4, 1913, Chap. 160, 37 Stat. L. 1013; Louisville & N. R. Co. v. R. R. Com. of Alabama, 208 Fed. 35, *post* Sec. 465.

352. *Ex parte Young*, 209 U. S. 123, 52 L. Ed. 714, 28 Sup. Ct. 441; *Cent. of Ga. Ry. Co. v. Mc-Lendon*, 157 Fed. 961.

353. *Prentiss v. Atlantic C. L. R. Co.*, 211 U. S. 210, 53 L. Ed. 150, 29 Sup. Ct. 67.

354. *Southern Ry. Co. v. Atlanta Stove Works*, 128 Ga. 207, 57 S. E. 429.

355. Judicial Code, sec. 237.

## CHAPTER II.

### VALIDITY AND SCOPE OF THE ACT TO REGULATE COMMERCE.

- § 61. Common Law Obligations of Common Carriers.
- 62. Power of Congress over Interstate Commerce.
- 63. Constitutionality of the Act to Regulate Commerce.
- 63a. Same Subject. Transportation Act 1920.
- 64. Reasons for the Act to Regulate Commerce.
- 65. Carriers Included in the Act.
- 66. Carriers' Duties under the Act.
- 67. What Transportation Included in the Act.
- 68. Transportation Included in the Act, continued.
- 69. Same Subject.
- 70. Powers and Procedure of the Interstate Commerce Commission.
- 71. Same Subject.
- 72. Switch Connections.
- 73. Damages and Penalties for Misquoting a Rate.
- 74. Penalties.
- 75. Investigations by the Interstate Commerce Commission.
- 76. Additional Power Given the Interstate Commerce Commission.
- 77. Commission May Suspend an Advance in Rates.
- 78. Report of Carriers.
- 79. Court Procedure with Reference to the Orders of the Commission.

§ 61. **Common Law Obligations of Common Carriers.**—The duty of a common carrier to transport at reasonable rates existed at common law.<sup>1</sup> This was and is true because the business of carriage for the public is one of a *quasi* public nature and the charges therefor are subject to regulation by the public. In the Abilene case,<sup>2</sup> Mr. Justice White, delivering the opinion of the court said:

1. *Tift v. Southern Ry. Co.*, 123 Fed. 789. The Circuit Court expressed the idea in the following apt language: "And so we are of opinion that the right of a shipper to have his property carried at a reasonable rate in the transaction of his business is a right of property, that to enforce such right our system of

jurisprudence does not leave him remediless, and that where an action at law is inadequate a remedy in equity must and does exist, *McLean Lumber Co. v. United States*, 237 Fed. 460, 466."

2. *The Abilene Case, Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350, 9

"Without going into detail it may not be doubted that at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy that when a carrier accepted goods without payment of the cost of carriage or an agreement as to the price to be paid and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that even where, on the receipt of goods by a carrier, an exorbitant charge is stated and the same is coercively exacted either in advance or at the completion of the service, an action may be maintained to recover the overcharge. 2 Kent. Comm. 599, and note A; 2 Smith Lead. Cas., pt. 1, 8th Ed., Hare & Wallace Notes, p. 457."

The principle of the right of organized society to regulate the rates and practices of carriers was recognized at least as early as the date of the laws of Hammurabi, King of ancient Babylon,<sup>3</sup> and the same principle appears in the common law. The application of the principle is traced in the opinion of Chief Justice Waite in *Munn v. Illinois*,<sup>4</sup> wherein the reason therefor is stated to be that where "one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use."

It has been held by the Supreme Court of the United States that rates charged in contracts of fire insurance may be regulated by state laws, the basis for the decision being that when a business by its circumstances and nature rises from a private to a public concern, such business becomes subject to governmental regulation.<sup>5</sup>

Ann. Cas. 1075. See also Penn. R. Co. v. Puritan Coal Co., 237 U. S. 121, 59 L. Ed. 867, 35 Sup. Ct. 484.

3. Stephens v. Central of Ga. Ry. Co., 138 Ga. 625, 628, 75 S. E. 104, 42 L. R. A. (N. S.) 541, 1913 E. Ann. Cas. 609.

4. *Munn v. Illinois*, 94 U. S. 4 Otto 113, 24 L. Ed. 77. For

summary of state legislation regulating public utility corporations, see Interstate Com. Com. v. C. N. O. & T. P. Ry. Co., 167 U. S. 479, 495, 496, 42 L. Ed. 243, 17 Sup. Ct. 896, and *Simpson v. Shepard*, 230 U. S. 352, 412-417 Inc., 57 L. Ed. 1511, 33 Sup. Ct. 729.

5. *German Alliance Ins. Co. v.*

Unjust discrimination was also illegal at common law. The Supreme Court has approved a charge substantially to the effect that not every discrimination in rates is unjust, and that in order to constitute an unjust discrimination, there must be a difference in rates under substantially similar conditions as to service. All rates must be reasonable; and, under like conditions, all patrons must be served on equal terms. While there is no body of federal common law separate and distinct from the common law existing in the several states, the principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment.\*

§ 62. **Power of Congress over Interstate Commerce.**—Paragraph 3, Section 8, Article 1, of the Constitution of the United States contains the grant of power to Congress over interstate commerce and gives Congress the power “to regulate commerce with foreign nations, among the several states, and with the Indian tribes.”

The limitation of the scope of this book and a general statement of the extent of the regulatory power of the federal government have been stated in Chapter I, *supra*. There it was shown that the power of Congress over interstate commerce was plenary and indivisible.

That the power to regulate interstate commerce is complete in Congress has never been doubted. Mr. Chief Justice Marshall stated this power in language which has frequently been cited with approval. He said:†

“We are now arrived at the inquiry, What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those ob-

Lewis, 233 U. S. 389, 58 L. Ed. 1011, 34 Sup. Ct. 612.

6. Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92, 45 L. Ed. 765, 21 Sup. Ct. 561.

7. Gibbons v. Ogden. 9 Wheat., 22 U. S. 1, 6 L. Ed. 23, 70. See, also, Howard v. Illinois Cent. R. Co., 207 U. S. 463, 492, 493, 52 L. Ed. 297, 307, 28 Sup. Ct. 141.

jects, the power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

This broad statement of the power of Congress has been repeatedly affirmed and the principle applied. Congress, in the Act to Regulate Commerce, and the acts amendatory thereof and supplementary thereto, has not, as was shown in Chapter I hereof, as yet exercised its full constitutional power. In the laws regulating the liability of employers in interstate transportation Congress has fully occupied the field, and the decisions with reference to the scope of these laws are not always applicable to the statutes regulating interstate transportation generally.\*

The proviso to Section 1 of the Act to Regulate Commerce exempts from the provisions of that act intrastate transportation.<sup>8</sup> This exemption, however, does not leave the states free so to regulate intrastate transportation as to affect interstate transportation. This question was presented to the Interstate Commerce Commission, which held that certain Texas intrastate rates prescribed under authority of the statutes of Texas and maintained by carriers serving both Texas and Louisiana, were violative of Section 3 of the Act to Regulate Commerce, in that such rates constituted undue and unreasonable prejudice against shippers in Louisiana and gave an unreasonable preference to shippers in Texas. The Commission ordered the carriers to desist from this discrimination.<sup>9</sup> This order was sustained by the Commerce Court, and an appeal taken to the Supreme Court.<sup>11</sup> Both in the opinion of the Commission and in that of the Commerce Court, mention was made of the fact that the carriers had not resisted in the courts the rates prescribed by the Texas Railroad Commission. This fact seems not to have been regarded as material by the Supreme Court, which Court upheld the

8. Sec. 332 *post*, as to Employers' Liability Laws.

9. Sec. 336, *post*.

10. Railroad Com. of La. v. St. L. S. W. Ry. Co., 23 I. C. C. 31.

11. Tex. & Pac. R. Co. v. U. S., 205 Fed. 380, Op. Com. Ct. No. 68, p. 655; Houston E. & W. T. R. Co. v. U. S., 205 Fed. 391, Op. Com. Ct. No. 67, p. 653.

order of the Commission on the broad ground that any unjust discrimination however caused was prohibited by Congress, and that no state could lawfully require the maintenance of transportation rates within the state which unjustly discriminated against interstate shippers. The Court in a convincing opinion held that where injurious discrimination resulted from state made intrastate rates, Congress is not bound to reduce interstate rates below what it may deem to be a proper standard, fair to the carrier and to the public; but that Congress, and by Congress is included tribunals authorized to act in prescribing rates, is entitled to maintain its own standard of interstate rates.<sup>12</sup>

Oklahoma, Arkansas and Missouri, maintaining intrastate passenger rates of two cents a mile, brought complaint before the Interstate Commerce Commission alleging that the interstate passenger rates of three cents a mile into and through these states were unreasonable and discriminatory. The Interstate Commerce Commission, having found that the evidence failed to show that the interstate rates were unreasonable, dismissed the complaint. In the course of the opinion it was said:<sup>13</sup>

"That rates established by state laws or state authorities, prescribing the charge for intrastate transportation of persons and property, are facts that we consider, and that we respect the authority establishing such rates constitute no valid reason relieving us from performing the duties devolving upon this Commission under the Constitution and laws of the United States. The Constitution of the United States reserves to Congress the power to regulate interstate commerce, and Congress, under this grant of authority, has imposed upon this Commission certain duties. If any rate for transportation wholly within a state may be made the measure of the rates when that transportation moves from one state through or into another, the interstate rate so resulting would not be regulation of interstate commerce by the au-

12. *Houston E. & W. T. R. Co. v. A. T. & S. F. Ry. Co. et al.*, 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833. 31 I. C. C. 532, 540, 541. See also *Rates on Beer and Other*

13. *Corp. Com. of Okla. et al. Malt Products*, 31 I. C. C. 544.

thority prescribed by the Constitution, but by the state. If the function of this Commission be to compute the sum of intrastate rates and prescribe the result as a measure of the interstate rates, actual and direct regulation of interstate commerce by the states would be the result. That in the regulation of interstate commerce by the general government and of intrastate commerce by the state governments there result inconveniences and anomalies, such as is contended to exist here, might be conceded; but such facts, if they exist, neither deprive us of the power nor relieve us from the duty of performing the obligations imposed upon us by laws of Congress authorized by the Constitution of the United States.

"Were we at liberty and inclined to abdicate the authority and abandon the duty imposed upon us by accepting the sum of state rates as a measure of interstate rates, the difficulty would not be removed."

Transportation Act 1920 in substance adds nothing to the power of the Commission over intrastate rates. The statute in this respect does no more than to prescribe certain rules of procedure and to recognize rules of law theretofore applied by the Commission.

#### § 63. Constitutionality of the Act to Regulate Commerce.

—The constitutional grant of power to regulate commerce with foreign countries and between the states is plenary. The absence of this power was, as is well known, one of the principal reasons for dissatisfaction with the confederacy existing prior to the adoption of our constitution. Just what powers could be constitutionally delegated or given to the commission was the question to be determined by the framers of the acts to regulate commerce. It has been held that to prescribe rates for the future is a legislative power, to determine whether or not a rate is reasonable is a judicial question.<sup>14</sup> The legislature of a state may directly prescribe maximum rates, or such power may be delegated to a commission.<sup>15</sup>

14. *Chicago M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462, 702. *Prentiss v. Atlantic C. L. Co.*, 211 U. S. 210, 53 L. Ed. 150, 29 Sup. Ct. 67.

15. *Munn v. Illinois*, 94 U. S. 4 Otto 113, 24 L. Ed. 77; *Stone v. Farmers L. & T. Co.*, 116 U. S. 307, 29 L. Ed. 636, 6 Sup. Ct. 334, 1191; *Georgia R. & B. Co.*

Prior to the amendment known as the Hepburn Act the Interstate Commerce Commission was a mere administrative body, with no power to fix rates. It could make findings and declare a particular rate unreasonable, these findings were *prima facie* true and were entitled to the "strength due to the judgment of a tribunal appointed by law and informed by experience."<sup>16</sup> The original act was held to be valid by the Supreme Court.<sup>17</sup> The court in the course of the opinion said:

"Interpreting the Interstate Commerce Act as applicable, and as intended to apply, only to matters involved in the regulation of commerce, and which Congress may rightfully subject to investigation by a commission established for the purpose of enforcing that act, we are unable to say that its provisions are not appropriate and plainly adapted to the protection of interstate commerce from burdens that are or may be, directly or indirectly imposed upon it by means of unjust and unreasonable discriminations, charges, and preferences. Congress is not limited in its employment of means to those that are absolutely essential to the accomplishment of objects within the scope of the powers granted to it. It is a settled principle of constitutional law that 'the government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.' *McCullough v. Maryland*, 17 U. S. 4 Wheat. 316 (4 L. Ed. 579, 602). The test of the power of Congress is not the judgment of the courts that particular means are not the best that could have been employed to effect the end contemplated by the legislative department. The judiciary can only inquire whether the means devised in the execution

v. Smith, 70 Ga. 694, 128 U. S. 441, 454, 51 L. Ed. 1128, 1134, 27 Sup. Ct. 700.

16. *Illinois Cent. R. Co. v. Interstate Com. Com.*, 206 U. S. 174, 32 L. Ed. 377, 9 Sup. Ct. 47.  
17. *Interstate Com. Com. v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047, 14 Sup. Ct. 1125.

of a power granted are forbidden by the constitution. It cannot go beyond that inquiry without entrenching upon the domain of another department of government. That it may not do with safety to our institutions. *Union Pac. R. Co. v. United States* ("Sinking Fund Cases") 99 U. S. (9 Otto.) 100, 718, 25 L. Ed. 496, 501."

In *United States v. Delaware & Hudson Co.*,<sup>18</sup> it was contended that the so-called commodity clause of section one of the present act was unconstitutional, one of the grounds for such contention being that the penalties prescribed by the amended act brought it within the decision of the Supreme Court in *Ex parte Young*, 209 U. S. 123, 52 L. Ed. 714, 28 Sup. Ct. 441. The clause as construed by the Supreme Court was held valid. On the question of the effect of the penalties, at page 417 of the opinion, the court said:

"With reference to the contention that the commodities clause is void because of the nature and character of the penalties which it imposes for violations of its provisions, within the ruling in *Ex parte Young*, 209 U. S. 123, we think it also suffices to say that even if the delay which the clause provided should elapse between its enactment and the going into effect of the same does not absolutely exclude the clause from the ruling in *Ex parte Young*, a question which we do not feel called upon to decide, nevertheless the proposition is without merit, because (a) no penalties are sought to be recovered in these cases, and (b) the question of the constitutionality of the clause relating to penalties is wholly separate from the remainder of the clause, and, therefore, may be left to be determined, should an effort to enforce such penalties be made."

Subsequently the right to enforce this clause as construed was upheld by the Supreme Court.<sup>19</sup> The constitutionality of

18. *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 53 L. Ed. 836, 29 Sup. Ct. 527.

19. *United States v. Lehigh V. R. Co.*, 220 U. S. 257, 55 L. Ed. 458, 31 Sup. Ct. 387; *Delaware L. & W. R. Co. v. United States*, 231 U. S. 363, 58 L. Ed. 269, 34

Sup. Ct. 65; *United States v. Delaware L. & W. R. Co.*, 238 U. S. 516, 59 L. Ed. 1438, 35 Sup. Ct. 873. For a further history of litigation under this clause, see *United States v. Lehigh Valley R. Co.* (221 Fed. 399).

the act generally was interestingly and accurately stated by Judge Severens at circuit in an opinion wherein he shows the necessity for Congress to adopt some such scheme as the Act to Regulate Commerce, and in which opinion he says:"

"It would have been impossible for Congress to have foreseen the multitude of questions depending upon the special facts presented sometimes in one complication and sometimes in another, and declare a single rule applicable to each."

The Supreme Court has held that Section 20 of the Act to Regulate Commerce as amended by the Act of June 29, 1906<sup>21</sup> is valid and not unconstitutional as a delegation of legislative power, and that the requirement that carriers doing both interstate and intrastate business should render to the Interstate Commerce Commission accounts of all their business, was not beyond the power of Congress.<sup>22</sup> The provision subjecting corporations to criminal prosecution is valid.<sup>23</sup>

In *Honolulu R. T. Co. v. Hawaii*<sup>24</sup> the Supreme Court said:

"The business conducted by the transit company is not purely private. It is of that class so affected by a public in-

20. *Louisville & N. R. Co. v. Interstate Com. Com.*, 184 Fed. 118, 122. For opinion of the Interstate Commerce Commission in this case see *New Orleans Board of Trade v. L. & N. R. Co.*, 17 I. C. C. 231. The Commerce Court set aside the order of the Commission, without however disagreeing with the circuit judges as to the validity of the Act to Regulate Commerce, *Louisville & N. R. Co. v. Interstate Com. Com.*, 195 Fed. 541, *Opinions Commerce Court* Nos. 4, 325 and 375. For opinion reversing the Commerce Court: *Interstate Com. Com. v. Louisville & N. R. Co.*, 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185. See also *United States v. Great N. R. Co.*, 157 Fed. 288, 291

21. *Post*, Sec. 432.

22. *Interstate Com. Com. v. Goodrich Transit Co.*, 224 U. S. 194, 56 L. Ed. 729, 32 Sup. Ct. 436, reversing the Commerce Court in *Goodrich Transit Co. v. Interstate Com. Com.*, Nos. 21, 22, 23, 24 *Opinions of Commerce Court* 95, 190 Fed. 943. See also *Kansas City Sou. Ry. Co. v. United States*, 231 U. S. 423, 58 L. Ed. 296, 34 Sup. Ct. 125, affirming same styled case *Opinions Commerce Court* No. 56, p. 641, 204 Fed. 641.

23. *New York C. R. Co. v. United States*, 212 U. S. 481, 492, 53 L. Ed. 613, 29 Sup. Ct. 304, cited in *United States v. Adams Exp. Co.*, 229 U. S. 381, 390, 57 L. Ed. 1237, 33 Sup. Ct. 878.

24. *Honolulu R. T. Co. v.*

terest that it is subject, within constitutional limits, to the governmental power of regulation. This power of regulation may be exercised to control, among other things, the time of the running of cars. It is a power legislative in its character and may be exercised directly by the legislature itself. But the legislature may delegate to an administrative body the execution in detail of the legislative power of regulation. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 393, 394, 38 L. Ed. 1014, 14 Sup. Ct. 1047; *Interstate Commerce Com. v. Cincinnati, New Orleans & Texas Pacific Railway Company*, 167 U. S. 479, 494, 42 L. Ed. 243, 17 Sup. Ct. 896."

What effect the penalties prescribed in the act may have on its constitutionality in view of the *Young* case *supra*, is a question that the act itself answers. The danger of incurring ruinous penalties pointed out in the *Young* case does not exist in the Act to Regulate Commerce. In this act the rates prescribed by the commission become effective only after thirty days' notice, during which time the order fixing the rates may "be suspended or set aside by a court of competent jurisdiction," if the rate prescribed be unlawful. The venue of suits "to enjoin, set aside, annul, or suspend any order or requirement of the commission" is fixed; and suits "may be brought at any time after such order is promulgated." It would seem that the carriers have full opportunity to test an order before feeling compelled by the possibility of penalties to obey it.

The validity of the amended fourth section of the act was sustained in a forcible opinion of the Supreme Court."

§ 63A. **Same Subject—Transportation Act 1920.**—The 1920 statute materially enlarges the scope of the Commission's power. It confers the right to prescribe minimum as well

*Hawaii*, 211 U. S. 282, 53 L. Ed. 186, 29 Sup. Ct. 55.

25. Secs. 15, 16, of Act to Regulate Commerce. See *post*, 396 and 411.

26. *United States v. A. T. & S. F. Ry. Co.*, 234 U. S. 476, 58 L. Ed. 1408, 34 Sup. Ct. 986, revers-

*ing A. T. & S. F. Ry. Co. v. U. S.*, 191 Fed. 856, Op. Com. Ct. Nos. 50, 51, p. 229, and sustaining orders of the Commission in *Railroad Com. of Nev. v. So. Pac. Co.*, 21 I. C. C. 329; *Spokane City of v. N. P. Ry. Co.*, 21 I. C. C. 400.

as maximum rates; but such right is necessary fully to enforce the provision against unjust discrimination, and there is no reason to doubt the constitutionality of the provision.

Elaborate provision is made for the adjustment of labor controversies. Many of these provisions are more or less lacking in force to compel obedience thereto. They do prescribe duties which probably are enforceable in courts of equity. That wages may be regulated was decided by the Supreme Court in sustaining the Adamson Law.<sup>27</sup> The constitutionality of the labor provision it is believed may be accepted.

The Commission is given jurisdiction over car service; is given the right under certain circumstances, to prescribe the lines or routes over which traffic shall move and it may require the joint use of terminals. These powers are analogous to the jurisdiction heretofore existing under which cars could be required to be furnished, under which routing has been controlled and under which through routes have been prescribed and physical connections required. The fundamental basis for these new enactments is similar to that supporting those powers which the Commission has long exercised, and such enactments are probably valid.

In the provision permitting the consolidation of existing and competing railroads Congress has sought to permit State corporations to do what the laws of some of the States creating the corporations prohibit. As to the few railroads chartered under Federal laws, Congress is no doubt competent to permit or require a consolidation. The competency of Congress "To authorize such consolidations in defiance of state legislation," has been expressly denied in a dictum of the Supreme Court. In *Northern Securities Case*,<sup>28</sup> this dictum is explained, and in discussing the explanation the Supreme Court said: "So far as the Constitution of the United States is concerned, a state may, indeed, create a corporation, define its powers, prescribe the amount of its stock and the mode in which it may be transferred. It may even authorize one of its corporations to engage in commerce of every kind,

27. *Wilson v. New*, 243 U. S. 332, 61 L. Ed. 755, 37 Sup. Ct. 298.  
28. Sec. 11, *ante*, and note thereto.

—domestic, interstate and international.” The state creates the instrumentality but when the instrumentality enters the field of interstate commerce, the powers of congress may be exercised. The Supreme Court further discussing the question said: “Whilst every instrumentality of domestic commerce is subject to state control, every instrumentality of interstate commerce may be reached and controlled by national authority, so far as to compel it to respect the rules for such commerce lawfully established by Congress.” The plenary power of Congress to regulate interstate commerce can only be effective by applying such power to the instrumentalities of such commerce, and notwithstanding the dictum quoted, this provision it is believed is within that power.

The issuance of stocks and bonds is discussed in Section 51 *ante* and it is thought this provision giving power to the commission to supervise such actions are valid. The right to operate a railroad with the power of eminent domain is a franchise which the sovereign power may withhold or grant on terms. Therefore, as to roads that have devoted their instrumentalities to the service of interstate commerce, the provisions regulating new construction and the discontinuance of existing facilities are within the constitutional grant to the Federal legislature.

The right to regulate rates includes the right to fix the measure of returns on capital. So the Congress, or when authorized the Commission, may legally say that such returns shall be 5; or 6 per centum. What particular per centum shall be prescribed is a legislative question, and if not made so high as to deprive a shipper of his constitutional property right to a service at a reasonable price, or so low as to amount to a taking of the property of the carriers, courts will not interfere. Where the Act, as here, requires that all rates shall be reasonable and shall yield a “fair return;” that some carriers, receiving only these reasonable rates, may make more than the prescribed percentum, does not authorize Congress to make any disposition of the excess. If the rate is reasonable, the proceeds belong to the carrier who performed the service. If the rate is unreasonable, the excess over a reasonable rate belongs to the shipper. It is, therefore, believed that the provisions of Section 422 of the Trans-

portation Act, Section 15a of the Interstate Commerce Act are unconstitutional, in violation of the Fifth Amendment insofar as they authorize the Commission to receive and dispose of any of the railway operating income of the carriers.

The statutory provisions relating to intrastate rates, when there is unjust discrimination aside from some procedural direction, but enumerates principles which the courts have said already existed;" and the slight change in the long and short haul provision of section 4 of the Interstate Commerce Act does not affect the validity thereof.

§ 64. **Reasons for the Act to Regulate Commerce.**—Prior to the act of February 4, 1887," carriers were free to make such rates on interstate transportation as they saw fit, subject only to the power of the courts under the common law, at the suit of individuals to prevent irreparable damage or give redress for unreasonable or unjustly discriminatory rates."

In *Tex. & Pac. R. Co. v. Interstate Commerce Commission*," the Supreme Court, speaking of this act, said:

"It may be well to advert to the causes which induced its enactment. They chiefly grew out of the use of railroads as the principal modern instrumentality of commerce. While shippers of merchandise are under no legal necessity to use railroads, practically they are. The demand for speedy and prompt movement virtually forbids the employment of slow and old-fashioned methods of transportation, at least in the case of the more valuable articles of traffic. At the same time, the immense outlay of money required to build and maintain railroads, and the necessity of resorting, in securing the rights of way, to the power of eminent domain, in effect prevent individual merchants and shippers from themselves

29. Secs. 44 and 62, *ante*.

30. Chapter 9, *post*.

31. *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350, 9 Ann. Cas. 1075; *Tift v. Southern Ry. Co.*, 123 Fed. 789, 138 Fed. 753; *Western Union Tel. Co. v.*

*Call Pub. Co.*, 181 U. S. 92, 45 L. Ed. 765, 21 Sup. Ct. 561; *United States v. Michigan Cent. R. Co.*, 122 Fed. 544.

32. *Texas & P. R. Co. v. Interstate Com. Com.*, 162 U. S. 197, 210, 211, 40 L. Ed. 940, 944, 945, 16 Sup. Ct. 666, 5 I. C. R. 405.

providing such means of carriage, From the very nature of the case, therefore, railroads are monopolies, and the evils that usually accompany monopolies soon began to show themselves, and were the cause of loud complaints. The companies owning the railroads were charged, and sometimes truthfully, with making unjust discriminations between shippers and localities, with making secret agreements with some to the detriment of other patrons, and with making pools or combinations with each other, leading to the oppression of entire communities.

"Some of these mischiefs were partially remedied by special provisions inserted in the charters of the companies and by general enactments by the several states, such as clauses restricting the rates of toll and forbidding railroad companies from becoming concerned in the sale or production of articles carried and from making unjust preferences. Relief, to some extent, was likewise found in the action of the courts in enforcing the principles of the common law applicable to common carriers—particularly that one which required uniformity of treatment in like conditions of service.

"As, however, the powers of the states were restricted to their own territories, and did not enable them to efficiently control the management of great corporations whose roads extend through the entire country, there was a general demand that Congress, in the exercise of its plenary power over the subject of foreign and interstate commerce, should deal with the evils complained of by a general enactment, and the statute in question was the result."

Amendatory and supplemental acts have enlarged the powers of the Commission, but these additions to the Commission's powers under the Interstate Commerce Act have had in view the purpose to prevent discrimination and to require certainty and stability in the rates charged. The amendment authorizing the supervision and standardization of the accounts of carriers<sup>33</sup> had for its purpose to enable the Commission better to perform its duties respecting the regulation of carriers.<sup>34</sup>

33. Sec. 433, *post*.

United States, 231 U. S. 423, 58

34. *Kansas City S. Ry. Co. v. L. Ed. 296, 34 Sup. Ct. 125.*

In the Minnesota Rate Cases," the fact that the purpose of the Act was not to include intrastate transportation was definitely stated.

The Minnesota Rate Cases dealt with the question of the constitutionality of rates prescribed by state authority applicable only within the state. A different question is presented when there is involved the relationship of interstate rates with intrastate rates. When such a question is presented, as was held in the Shreveport case *supra* (Sec. 62), the state rates must not unlawfully discriminate against interstate shippers, and when they do the Interstate Commerce Commission may grant relief.

**§ 65. Carriers Included in the Act.**—The original act applied only to transportation wholly by railroad, or partly by railroad and partly by water. Included in the definition of railroads are bridges, car floats, lighters, and ferries used or operated in connection therewith, the line in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and all instrumentalities of shipment or carriage. The present act extends the law to apply to the transportation of oil or other commodities, except water and gas, by means of pipe lines or partly by pipe lines and partly by rail or water, and includes express companies, telegraph, telephone and cable companies, whether wire or wireless; all switches, spurs, tracks, terminals and terminal facilities of every kind used or necessary in the transportation of the persons or property designated, and also all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any of said property; cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation

35. *Simpson v. Shepard*, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729. For statement as to the purpose of the acts original and amendatory, see *Armour Packing Co. v. United States*, 209 U.

S. 56, 52 L. Ed. 681, 28 Sup. Ct. 428; *United States v. Pacific & A. Ry. & Nav. Co.*, 228 U. S. 87, 108, 57 L. Ed. 742, 33 Sup. Ct. 443.

and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported.

Under the act, foreign carriers engaged in transporting between points within and points without the United States are subject to the regulations prescribed;<sup>36</sup> water carriers are subject thereto when the transportation is partly by rail and partly by water, when both being under a common contract, management or arrangement for a continuous carriage or shipment.<sup>37</sup> Under the Panama Canal Act,<sup>38</sup> of August 24, 1912, the Commission is given jurisdiction over the transportation of rail and water carriers when property is transported from point to point in the United States by rail and water, through the Panama Canal or otherwise. The extent of this jurisdiction is stated in the act, and the Commission has exercised the jurisdiction thus conferred.<sup>39</sup> A corporation organized to construct and maintain a bridge across a river running between two states, and which corporation owns no cars, but merely furnishes a highway over which common carriers and others may transport goods, was held not to be within the provisions of the act.<sup>40</sup>

Carriers by water between ports of different states under joint rates with railroads, which rates are filed with the Interstate Commerce Commission, are within the purview of

36. *Re Investigation of Acts Grand Trunk Ry. of Canada*, 3 I. C. C. 89, 2 I. C. R. 496. A rate, however, made by the Canadian Commission applicable in Canada—though part of the through rate from the United States to Canada—is not within the jurisdiction of the Commission. *International Paper Co. v. D. & H. Co.*, 33 I. C. C. 270. For a full discussion of this subject, see *Carey Mfg. Co. v. G. T. W. Ry. Co.*, 36 I. C. C. 203. Over shipments exclusively in Canada, the Commission has no jurisdiction, but it has jurisdiction of that part of a through

movement between Canada and the United States, which is in the United States. *Emery & Co. v. B. Q. M. R. R.*, 38 I. C. C. 636; *Lake and Rail Rate Cancellations*, 44 I. C. C. 745; *Carlowitz & Co. v. C. P. R. Co.*, 46 I. C. C. 290.

37. Sec. 335, *post*.

38. Sec. 375, *post*.

39. Sec. 224 and 375, *post*, *Augusta & Savannah S. S. Co. v. O. S. S. Co.*, 26 I. C. C. 380.

40. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567, 617, 2 L. R. A. 289, 2 I. C. R. 351.

the Act to Regulate Commerce, although such carriers are incorporated under the laws of a particular state."

In the Pipe Line cases" the Supreme Court sustained the jurisdiction of the Commission over pipe line carriers transporting oil in interstate commerce.

A terminal company, part of a railroad and steamship system, is within the act," and so is a rate between points in the same state which includes delivery on boat for interstate transportation."

A stock yard company, owning and operating a railroad system which transports cars to and from trunk lines which operate cars in interstate transportation, is within the act."

That street railways were not included within the law prior to the Amendatory Act of June 18, 1910," has been determined by the Supreme Court, although the effect of that act on the question was left undecided."

41. *Interstate Com. Com. v. Goodrich Transit Co.*, 224 U. S. 194, 56 L. Ed. 729, 32 Sup. Ct. 436, reversing *Goodrich Transit Co. v. Interstate Com. Com.*, 190 Fed. 943, Commerce Court Opinions 21 to 24, p. 95. Within the meaning of the Anti-Trust statutes, tugs employed in towing vessels engaged in interstate commerce are themselves instrumentalities of such commerce, *United States v. Great Lakes Towing Co.*, 208 Fed. 733. Where there is no common or joint arrangement, water carriers held not within the Act, *Mutual Transit Co. v. United States*, 178 Fed. 664, except as provided in the Panama Canal Act, *supra*.

42. *United States v. Ohio Oil Co.*, 234 U. S. 548, 58 L. Ed. 1394, 34 Sup. Ct. 956.

43. *Southern Pacific Terminal Co. v. Interstate Com. Com.*, 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279.

44. *R. R. Com. of Ohio v. Worthington*, 187 Fed. 965, 110 C. C. A. 85. See also, Note 58, *post*.

45. *United States v. Union Stock Yards*, 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83; *Union Stock Yard & Transit Co. v. United States*, 192 Fed. 330, Commerce Court Opinion No. 15, pp. 189 and 225. See also *Manufacturers Ry. Co. v. St. Louis I. M. & S. Ry. Co.*, 21 I. C. C. 304 and cases cited.

46. *Post*, Sec. 337.

47. *Omaha & C. B. Street Ry. Co. v. Interstate Com. Com.*, 230 U. S. 324, 57 L. Ed. 1501, 33 Sup. Ct. 890, 40 L. R. A. (N. S.) 385 reversing same styled case, 191 Fed. 40, Commerce Court Opinion No. 25, p. 147, and affirming same styled case, 179 Fed. 243, and setting aside order of Interstate Commerce Commission in *West End Improvement Club v. Omaha & C. B. Street Ry. Co.*, 17 I. C. C. 239. See also *Wil-*

The commission has frequently acted under the power granted it over express companies, which are now specifically included."

The Act to Regulate Commerce is, however, not so broad as the Safety Appliance and Employers' Liability Acts, and Congress has expressly, by the proviso to Section 1, excluded intrastate commerce."

§ 66. **Carriers' Duties under the Act.**—It is the duty of every carrier subject to the provision of the law to provide and furnish transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.

All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Just and reasonable regulations and practices affecting classification of commodities must be established, observed and enforced.

Railroads are prohibited from transporting certain commodities in which they are interested. Switch connections, under certain circumstances, must be made with other carriers and with shippers. Rebates and other forms of discrimination are prohibited. Undue and unreasonable preferences to persons, places or particular kinds of traffic are illegal; and, except in special cases, no greater charge shall be made for a shorter than a longer haul, the shorter being

son v. Rock Creek Ry. Co., 7 I. C. C. 83, and see South Covington R. Co. v. Covington, 235 U. S. 537, 59 L. Ed. 350, 35 Sup. Ct. 158.  
48. American Exp. Co. v. United States, 212 U. S. 522, 53 L. Ed. 635, 29 Sup. Ct. 315; Barrett v. New York City, 183 Fed. 793. Nor does it make any difference that the company is not a corporation, United States v. Adams

Exp. Co., 229 U. S. 381, 57 L. Ed. 1237, 33 Sup. Ct. 878.

49. Pacific C. Ry. Co. v. United States, 173 Fed. 448; United States v. Union Stock Yards Co., 192 Fed. 330, 339, Commerce Court Opinion No. 15, p. 189, 225; Simpson v. Shepard, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729; Sec. 61, *supra*.

included in the longer. Transportation of freight must be continuous, pooling is regarded, and rates are required to be published, posted and maintained.

Transportation Act 1920 adopted and amended the Car Service Act prescribing in detail the duties of railroads with reference to furnishing and distributing cars." The 1920 Act also restricted the freedom of the carriers in constructing new or extending old lines, regulated the issuance of stocks and bonds," and otherwise enlarged regulation and increased the power of the Commission."

Carriers included in the Act must keep accounts according to requirements prescribed by the Commission, and must make reports to the Commission as required."

The Supreme Court, speaking of the Act, has said:"

"It cannot be challenged that the great purpose of the Act to Regulate Commerce, whilst, seeking to prevent unjust and unreasonable rates, was to secure equality of rates to all, and to destroy favoritism, these last being accomplished by requiring the publications of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve."

The Act, while repeating and adopting the common-law rule that rates should be reasonable, had as its principal purpose the prevention of unjust discrimination and undue and unreasonable preference. The shipper could protect himself more easily from unreasonable rates than he could from secret and

50. Transportation Act 1920, Sec. 402, being paragraphs 10 to 17 of Interstate Commerce Act, Secs. 344a to 344h, *post*.

51. *Id.* paragraphs 18 to 22, secs. 344i to 344m, *post*.

52. See Chapter 9, *post*.

53. *Post* chapter 9. And see, Interstate Com. Com. v. Goodrich Transit Co., 224 U. S. 194, 56 L. Ed. 729, 32 Sup. Ct. 436;

United States v. Adams Exp. Co., 229 U. S. 381, 57 L. Ed. 1237, 33 Sup. Ct. 878; Kansas City So. Ry. v. United States, 231 U. S. 423, 58 L. Ed. 296, 34 Sup. Ct. 125.

54. New York N. H. & H. R. Co. v. Interstate Com. Com., 200 U. S. 361, 391, 50 L. Ed. 515, 521, 26 Sup. Ct. 272.

ruinous discrimination against him and preferences to his competitor. Equality of treatment and the "open gateway policy" are sought to be obtained by the act.

All the provisions of the original, amendatory and supplemental acts regulating interstate transportation have as their purpose reasonable and non-discriminatory charges. To effectuate these purposes the law prescribes rules and authorizes the Commission to make other rules and regulations by which the purposes may be accomplished.

§ 67. **What Transportation Included in the Act.**—The transportation included in the act is that "from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia, or from one place in a territory to another place in the same territory, or from any place in the United States to an adjacent foreign country \* \* \* and carried from such place to a port of trans-shipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country." The above quotation is taken from section one of the original act, except the phrase applying to transportation between places in the same territory was added by the amendment of June 29, 1906."

By the Act of 1910, telegraph, telephone and cable companies and the transportation of oil were included in the act." The Panama Canal Act extended jurisdiction to water carriers.

The proviso of section one of the original act was retained in its original form" until the Act of 1910, when it was changed in language but not in essential substance. Transportation Act 1920 made another change of form. In the

55. *Rahway V. R. Co. v. Delaware, L. & W. R. Co.*, 14 I. C. C. 191, 194. And, see, also *Rates for Transportation of Anthracite Coal*, 35 I. C. C. 220, 289.

56. Common control, etc., discussed, *Standard Oil Co. v. United States*, 179 Fed. 614. For a discussion of the provision relating to transportation of oil,

see *Prairie Oil & Gas Co. v. United States*, 204 Fed. 798, Commerce Court Opinion. Act held valid and Commerce Court reversed; the *Pipe Line Cases*, *U. S. v. Ohio Oil Co.*, 224 U. S. 548, 58 L. Ed. 1394, 34 Sup. Ct. 956.

57. *Post*, Sec. 335.

58. *Post*, sec. 336.

original provision, the 1910 Amendment and in the 1920 Amendment intrastate commerce was excluded from the provisions of the statute." In 1920 Congress recognized what the Commission and the courts had already decided, that intrastate rates unjustly discriminating against interstate commerce could be regulated."

That this provision leaves to the states the regulation of intrastate commerce has already been shown."

The *Daniel Ball*" is a case frequently cited and sometimes given a construction that is of doubtful correctness. The libel was brought by the United States for penalties under the act of July 7, 1838, 5 Stat. L. 304, requiring a license for vessels "to transport any merchandise or passengers upon the bays, lakes, rivers or other navigable waters of the United States." Two questions were presented, one being that the waters upon which the steamer plied were not "navigable waters of the United States." This question being answered by the court's holding that such waters were navigable waters within the meaning of the act, it was further contended that the steamer was engaged wholly in internal commerce. It was admitted that she received freight originating beyond the state destined to points in the states and also received freight in the state destined to points beyond. The language of Mr. Justice Field must be construed in connection with the facts of the case, and it will be noticed that he stresses the fact that the transportation was "on the navigable waters of the United States." In the further course of the opinion it was said:

"It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a state; that Congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a state on which grain or fruit is transported to a distant market.

"We answer that the present case relates to transportation on the navigable waters of the United States, and we are not

59. Sec. 336, *post*.

60. Sec. 393b, *post*.

61. *Supra*, Sec. 43.

62. The *Daniel Ball v. United States*, 10 Wall., 77 U. S. 557, 19 L. Ed. 999.

called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation. And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the states, when that agency extends through two or more states, and when it is confined in its action entirely within the limits of a single state. If the authority does not extend to an agency in such commerce when the agency is confined within the limits of a state, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a state, and leaving it at the boundary line at the other end, the federal jurisdiction would be entirely ousted, and the constitutional provision would be a dead letter."

In *Gulf C. & S. F. Ry. Co. v. Texas*<sup>63</sup> there were involved two independent shipments, and the fact that the first was interstate did not make the second, moving between points both of which were in Texas, an interstate shipment.

The Commission held that an indispensable element of a through shipment was a contract therefor;<sup>64</sup> but while this statement may be correct generally, it disregards the principle that substance and not mere form controls. In the *Social Circle case*<sup>65</sup> an intrastate movement that was part of an interstate movement under a through bill of lading, was held subject to the supervision of the Commission.

§ 68. **Transportation Included in Act, Continued.**—As stated in the preceding section, the general rule that a contract for through shipment determines whether or not the shipment is interstate or intrastate, and the decision in *Gulf*,

63. *Gulf, C. & S. F. R. Co. v. Texas* 204 U. S. 403, 51 L. Ed. 510 27 Sup. Ct. 360.

64. *Re Alleged Unlawful Rates and Practices* 7 I. C. C. 240, 247.

65. *Cincinnati, N. O. & T. P. R. Co. v. Interstate Com. Com.* 162 U. S. 184, 192, 40 L. Ed. 935, 938.

16 Sup. Ct. 700. See also, *United States v. Wood*, 145 Fed. 405, 411; *United States v. Colorado & N. W. Ry. Co.* 157 Fed. 321, 85 C. C. A. 48; *Chicago, B & Q. R. Co. v. United States*, 157 Fed. 830, 85 C. C. A. 194.

Colorado & Sante Fe Ry. Co. v. Texas must be limited by the principle that the substance and not the mere form controls. In the Galveston Terminal Case<sup>66</sup> it was held that where goods were intended for export, the fact that the first bill of lading was issued to a terminal within the state, the commodity there to be delivered to a carrier for a foreign destination, did not make the movement an intrastate one, and that such transportation was subject to regulation by the Interstate Commerce Commission. In this case emphasis was laid upon the fact that the Terminal Company was controlled by the Railroad Company, and in the course of the opinion it was said:

"Verbal declarations cannot alter the facts. The control and operation of the Southern Pacific Company of the railroads and the Terminal Company have united them into a system of which all are necessary parts, the Terminal Company as well as the railroad companies."

And the conclusion of the Court is shown by this language:

"The Terminal Company is part and parcel of the system engaged in the transportation of commerce, and to the extent that such commerce is interstate the Commission has jurisdiction to supervise and control it within statutory limits. To hold otherwise would in effect permit carriers generally, through the organization of separate corporations, to exempt all of their terminals from our regulating authority."

This case was followed and the Santa Fe case distinguished in a subsequent case,<sup>67</sup> where it was held that, although continuity of movement might be conceded as necessary to make the shipment, the court could look behind the mere billing and determine the real character of the transportation. In

66. Southern Pac. Term. Co. v. Interstate Com. Com., 219 U. S. 498 55 L. Ed. 310, 31 Sup. Ct. 279, citing *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. 475, sustaining the Commission in *Eichenberg v. Southern Pac. Co.*, 14 I. C. C. 250.

67. Texas & N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111, 57 L. Ed. 442, 33 Sup. Ct. 229,

citing *The Galveston Terminal Case* and *R. R. Com. of Ohio v. Worthington*, 225 U. S. 101, 56 L. Ed. 1004, 32 Sup. Ct. 653. And see *Texas & P. R. Co. v. R. R. Com. of Louisiana*, 183 Fed. 1005; *'Re Discrimination in Wharfage at Pensacola*, 27 I. C. C. 252. For cases like the Santa Fe Case, see *United States v. Wood*, 145 Fed. 405, 411; *Oregon R. & Nav. Co.*,

*Railroad Companies of Louisiana v. Texas Pac. R. Co.*,<sup>68</sup> the principles established by former decisions were stated: "The principle enunciated in the cases were that it is the essential of the character of the commerce, not the accident of local or through bills of lading which determines federal or state control over it. And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another state or to a foreign country." The delivery of cars for interstate shipment is within the act.<sup>69</sup>

In the Iowa case<sup>70</sup> the shipments of coal moved to Davenport, Iowa, in interstate commerce. Upon the arrival of the coal at Davenport, all transportation charges thereto were paid; and, without unloading the cars, the consignee tendered written billing for reshipment to local points in Iowa; the carrier refused to accept such reshipment in foreign cars, claiming that the shipment should be unloaded and reloaded into its own cars. The commodity when shipped from the original point of origin in a state other than Iowa, was destined to Davenport, at which place the consignee could unload and there sell or reconsign the coal to another place. It being found as a fact that, "The certainty in regard to the shipments of coal ended at Davenport," the Supreme Court of the United States sustained the Supreme Court of Iowa in holding that this reshipment into Iowa was an intrastate movement. The carrier had contended that the method adopted was a device to secure a lower than the through

v. Campbell, 180 Fed. 253, same styled case, 173 Fed. 957, 177 Fed. 318.

68. *R. R. Com. of Louisiana v. Texas & P. R. Co.*, 229 U. S. 336, 57 L. Ed. 1215, 33 Sup. Ct. 837.

69. *Chicago, R. I. & P. Ry. Co. v. Hardwick Farmers Elevator Co.*, 226 U. S. 426, 57 L. Ed. 284, 33 Sup. Ct. 174.

70. *Chicago M. & St. P. R. Co. v. Iowa*, 233 U. S. 334, 58 L. Ed. 988, 34 Sup. Ct. 592; *State v. Chicago M. & St. P. R. Co.*, 152 Iowa 317, 130 N. W. 802. See

also *Kanotex Refining Co. v. A. T. & S. F. R. Co.*, 34 I. C. C. 271; *Railroad Com. v. Worthington*, 225 U. S. 101, 56 L. Ed. 1004, 32 Sup. Ct. 653; and the quotation from the *Daniel Ball* Sec. 67 *supra*. *Illinois Grain to Chicago*, 40 I. C. C. 124; *Tampa Fuel Co. v. A. C. L. R. Co.*, 43 I. C. C. 231; *Green v. A. & V. Ry. Co.*, 43 I. C. C. 662, 673; *United States v. Illinois C. R. Co.*, 230 Fed. 940; *United States v. P. & R. Ry. Co.*, 232 Fed. 946; *Alabama G. S. R. Co. v. McFadden*,

rate; the local rate from Davenport added to the interstate rate thereto being less than the through rate from the point of origin to the point of final destination. This contention of the carrier presented a question of fact, and on the question of fact the Supreme Court of the United States said: "We are unable to say upon this record that the state court has improperly characterized the traffic in question here." The state court having held that the second movement was an intrastate movement subject to regulation by the state authorities, its judgment was affirmed by the Supreme Court. The criticisms that have been directed at this opinion fail to give proper consideration to the finding of facts involved. The Supreme Court adopted the facts as found by the state court, but took occasion to say: "It is undoubtedly true that the question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract." Whether assent be granted or withheld from the conclusions of fact found by the state court and accepted by the Supreme Court, the law as announced by the latter court is entirely consistent with the decisions in the cases cited in notes 59-61 *supra*.

In the Shreveport case the Commerce Court held that discrimination which was the result of a purely intrastate rate was not justified because the result of a State Commission-made-rate, and that as to interstate commerce such discrimination could be prohibited by the Interstate Commerce Commission.<sup>71</sup> This case was affirmed by the Supreme Court, the conclusion being that Sec. 3 of the Act to Regulate Commerce was intended to, and does, make illegal all unjust discrimination, even though the discrimination be caused by an intrastate rate prescribed by or under authority of a state law, and that Congress is not required to remove the dis-

232 Fed. 1000. Affirmed *McFadden v. A. G. S. R. Co.*, 241 Fed. 562, 154 C. C. A. 338; *Landon v. Public Utilities Com.*, 242 Fed. 658, 683 and cases cited; *Settle v. B. & O. S. W. R. Co.*, 249 Fed. 913, — C. C. A. —; *Atchison T. & S. F. R. Co. v. Harold*, 241 U.

S. 371, 60 L. Ed. 1050, 36 Sup. Ct. 665.

71. *Texas & P. R. Co. v. Interstate Com. Com.*, 205 Fed. 380, sustaining the Commission in *R. R. Com. of La. v. St. Louis & S. W. Ry. Co.*, 23 I. C. C. 31.

crimination by lowering an interstate rate not found to be too high."

When a combination rate is in force from the United States to a point in Canada, the Interstate Commerce Commission has held that it has no jurisdiction of that part of the combination rate "applicable only in Canadian territory." Nor has the Commission any jurisdiction of a shipment moving through the United States from Canada to Cuba. Alaska is a territory within the meaning of the act."

§ 69. **Same Subject.**—If a transportation movement beginning and ending in a state passes for a substantial part of the distance through another state, the state in which such transportation begins and ends cannot regulate the rate." The decision in which this holding was made has been distinguished in subsequent cases but not to limit the principle as here stated." But where such shipment moves through another state when it could have moved intrastate at a lower rate, reparation will be awarded."

Speaking of Water Carriers, the Supreme Court has said:"

"Certain it is that, when engaged in carrying on traffic under joint rates with railroads, filed with the Commission,

72. *Houston E. & W. Ry. Co. v. U. S.*, 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833. See also *Corp. Com. of Okla. v. A. T. & S. F. Ry. Co.*, 31 I. C. C. 532.

73. *Fullerton Lumber & Shingle Co. v. Bellingham Bay & British Columbia R. Co.*, 25 I. C. C. 376. See also note 36 *supra* and *Quintal & Lynch v. Fla. E. C. R. Co.*, 57 I. C. C. 289.

74. *Interstate Com. Com. v. United States ex rel. Humbolt S. & Co.*, 224 U. S. 474, 56 L. Ed. 849, 32 Sup. Ct. 556.

75. *Hanley v. Kansas C. S. R. Co.*, 187 U. S. 617, 47 L. Ed. 333, 23 Sup. Ct. 214, distinguishing *Lehigh Valley R. Co. v. Pennsylvania* 145 U. S. 192, 36 L. Ed. 672, 12 Sup. Ct. 806, 4 I. C. C. 87;

*Northern P. Ry. Co. v. Solum*, 247 U. S. 477, 62 L. Ed. 1221, 38 Sup. Ct. 550.

76. *Cincinnati, Portsmouth, etc. Packing Co. v. Bay*, 200 U. S. 179, 50 L. Ed. 428, 26 Sup. Ct. 208; *Ewing v. City of Leavenworth*, 226 U. S. 464, 468, 57 L. Ed. 303, 33 Sup. Ct. 157. The *Hanley Case* was cited as authority in *Simpson v. Shepard*, 230 U. S. 352, 401, 57 L. Ed. 1511, 33 Sup. Ct. 729.

77. *Lathrop Lumber Co. v. Alabama G. S. R. Co.*, 27 I. C. C. 250.

78. *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 208, 56 L. Ed. 729, 32 Sup. Ct. 436, Reversing the Commerce Court in *Goodrich*

the carriers are bound to deal upon like terms with all shippers who seek to avail themselves of such joint rates, and are subject to the general requirements of the act preventing and punishing the giving of rebates, the making of unjust discriminations, the showing of favoritism and other practices denounced in the various sections of the act."

And it was held that such carriers were subject to sections 12, 15, 20, and 21 of the Act to Regulate Commerce. Prior to the passage of the Panama Canal Act, water carriers not joining in a through route or common arrangement with rail carriers were not subject to the provisions of the act." Since the passage of this act the Commission has jurisdiction "when property may be or is transported from point to point in the United States, through the Panama Canal or otherwise." "

§ 70. **Powers and Procedure of the Commission.**—In the first seven sections of the act to regulate interstate railroads are stated the rights of the shipper and the duties of the carrier. Sections six, eight, nine, thirteen, fourteen, fifteen, fifteen-a, sixteen, sixteen-a and twenty relate to the remedies of shippers, and the administration of the act by the commission. Section ten relates to public penalties, sections eleven and twenty-four to the appointment of the commissioners, sections twelve, eighteen, twenty-one, and twenty-two, apply to the commission's purely administrative duties. Section seventeen relates to forms of procedure. Section twenty-two expressly retains existing common law and statutory remedies, and section twenty-three provides for cumulative remedies in the courts of the United States. Section sixteen also provides a period of limitation in which to bring complaints for damages. Section twenty makes the receiving carrier liable for loss, damage, or injury to property, which it has received for transportation, whether caused by it or a connecting carrier to whom it may have delivered the shipment. Section 19a, added by the Amendment of March 1, 1913, invests the Commission with power after investigation to

*Transit Company v. Interstate*  
*Com. Com.*, 190 Fed. 943.

79. *Re Jurisdiction Over Water*  
*Carriers*, 15 I. C. C. 205.

80. *Panama Canal Act* August  
12, 1914, Sec. 64, *supra*. See Sec.

379, *post*.

make a valuation of the property of common carriers subject to the act, and prescribes the effect of such valuations when made.

The Transportation Act, 1920 while adding somewhat to existing provisions gave the Commission in paragraphs 18, *et seq.*, of section 1, control over new construction by carriers subject to the Act; in section 15a, prescribed a percentage return for carriers; in section twenty-a, regulated the issuance of stocks and bonds; in section twenty-five provided for the regulation of common carriers by water in foreign commerce and in section twenty-six gave the commission authority by order to install automatic train-stop or train-control devices.

Other titles of the Transportation Act, 1920 contain provisions relating to Federal control of labor and to inland water-ways.

The duties prescribed in the Act to Regulate Commerce are not in substance broader than such duties at common law. It is in the remedies to enforce such duties that the act possesses its real importance. When a common carrier has violated the act it is "liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation," and, in addition to this common law damage, to "a reasonable counsel or attorney's fee." Suit for such damages the act says may be brought by "complaint to the commission," or by suit "in any district or circuit court of the United States of competent jurisdiction."

The Supreme Court of the United States, speaking of the provision of section nine, just quoted, says<sup>81</sup> "We think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the commission." This case was a suit brought in a

81. *Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350, 9 Ann. Case 1075. See also Sec. 383, *post*.

state court to recover damages for an alleged illegal rate charged, the rate being that prescribed in a legally filed tariff which had never been declared by the commission to be in violation of the law. While this suit was brought in a state court, and while express authority to sue in the United States courts is granted by section nine, the reasoning of the court would demand the same decision had the suit been brought in a "Court of the United States of competent jurisdiction."

§ 71. **Same Subject.**—Prior to the Hepburn Act the commission might determine whether a particular rate was just or unjust, but could not prescribe rates to control in the future. The Amendment of June 29, 1906 and the Transportation Act 1920 gave power to the commission, upon the complaint of natural or corporate persons, including mercantile, agricultural, or manufacturing societies, public corporations and state railroad commissions, or on its own motion, to make investigations with reference to rates or practices of interstate carriers, to make reports stating its conclusions, together with its decision, order or requirement, and when damages are awarded, such report should include the findings of fact on which the award was made; power and authority was granted to the commission and it was made its duty whenever, after full hearing upon a complaint made as provided in section thirteen of this act, or under an order for investigation and hearing on its own motion, it shall be of the opinion that any of the individual or joint rates, or charges whatsoever, demanded, charged, or collected by any carrier or carriers, subject to the provisions of this act, for the transportation of persons or property as defined in the first section of this act, or for the transmission of messages by telegraph or telephone, or that any individual or joint regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; to make an order that the carrier shall cease and desist from such violations, to the extent to which the commission might have found the same to exist, and further to require that the carrier should not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum or minimum rate or charge so prescribed, and should conform to to the regulation or

practice so prescribed. The power was also given the commission to require the establishment of through routes and to fix joint rates and to open terminals for joint use on terms to be prescribed, to prescribe an allowance which must be reasonable for a service or instrumentality furnished by the owner of property transported.

All awards of the commission, except orders for the payment of money, take effect within a reasonable time, not less than thirty days, and continue in force as prescribed unless suspended, set aside, or modified by the commission or a court of competent jurisdiction; and it is the duty of every common carrier, its agents and employees, to observe and comply with such orders under penalty. The Commission is by section nine of the Act of 1910, amending section six of the old law, given power to reject schedules under certain circumstances, and schedules so rejected are void, and the failure to comply with regulations adopted and promulgated by the Commission, is a criminal offense.

§ 72. **Switch Connections.**—Under section one of the Act of March 4, 1887, as amended by the Act of June 29, 1906, the Supreme Court held that the Interstate Commerce Commission had power to compel switch connections with lateral branch roads only at the instance of shippers and that it had no power to compel switch connections on the application of a branch railroad. This decision of the Supreme Court would not be applicable to the Act of 1910, as the "owner" of such lateral branch road has now the same rights as a shipper.

§ 73. **Damages and Penalties for Misquoting a Rate.**—Prior to the Act of 1910, a shipper, who had been damaged by the error of a common carrier in misquoting a rate, had no remedy. The Act of 1910, unchanged in 1920, amends section six of the prior Act by providing a penalty against the carrier for giving a shipper the wrong rate. As the statute in section eight gives a shipper the right to recover damages for any violation of the Act, it is believed that upon requesting a quotation of a rate as the statute requires, the shipper suffering damage in consequence of an erroneously stated rate, may recover such damages by suit against the carrier in any court of competent jurisdiction.

§ 74. **Penalties.**—Section ten of the old law is amended by the Act of 1910; paragraphs one, two and four of the old section are unchanged. Paragraph three of the original section ten is amended and enlarged, in line one, by adding after “person” the words “corporation or company;” after the word “package” in the old law, the new law adds “or the substance of the property;” “officer” is added to “agent” in the new law; and an “attempt” to obtain transportation at less than the legal rate is now illegal. Imprisonment is specifically made inapplicable to artificial persons, and this new language making illegal other acts is added: “or who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer or otherwise, by false statement or representation as to cost, value, nature, or extent of injury, or by the use of any false bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, refund, or payment for damage or otherwise in connection with or growing out of the transportation of or agreement to transport such property, whether with or without the consent or connivance of the carrier, whereby the compensation of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates then established and in force on the line of transportation.”

§ 75. **Investigations by the Interstate Commerce Commission.**—Section thirteen of the original Act is enlarged by the Act of 1910, the principle change being to extend the power of the Interstate Commerce Commission to make investigations on its own initiative. The language of this amendment would seem to be broad enough to meet the decision of the Supreme Court in the *Harriman case*,<sup>82</sup> because after giving power to investigate “any matter or thing concerning which a complaint is authorized,” this is added: “or concerning which any question may arise under any of the provisions of this Act.”

82. *Harriman v. Interstate Com.* 29 Sup. Ct. 115.  
Com., 211 U. S. 407, 53 L. Ed. 253.

The Transportation Act 1920 further amends Section thirteen by prescribing a procedure where rates imposed by a state are involved. The amendment also specifically authorizes carriers to file petitions attacking such rates. These provisions added in 1920 are no more than declaratory of what was already law, except in so far as they require a particular procedure; and, even as to procedure, the requirements are practically the same as the Commission had theretofore followed.

**§ 76. Additional Power Given the Interstate Commerce Commission.**—Section fifteen, added by the Act of June 29, 1906, is amended by the Act of 1910 to enlarge and more definitely state the powers of the Interstate Commerce Commission. The amendment gives the Commission “on its own initiative” “in extension of any pending complaint or without any complaint,” power over “individual or joint rates,” and over “individual or joint classifications.” While the words “any regulations or practices whatsoever” affecting rates, contained in the Act of 1906, may have been sufficiently broad to include regulations affecting classifications and joint rates, if any doubt existed as to such Act being so inclusive, such doubt is removed by the Act of 1910.

The Transportation Act 1920 as stated in prior sections further enlarged the powers of the Commission. Of these powers the most important and practically the only new powers are; the right to prescribe minimum rates, to open terminals, the car service provisions, to regulate new construction and decide when existing facilities might be abandoned, to permit pooling and consolidations, to determine the routing of freight, to control the issuance of stocks and bonds and section fifteen-a, which is known as the provision for guaranteed returns.

Section 15a is of doubtful constitutionality.<sup>83</sup> Paragraph one contains definitions. Paragraph two names certain things which the Commission must consider in exercising its power to prescribe just and reasonable rates. The things named have

83. Sec. 63a, *supra*, and Secs. 405a to 405m, *post*.

always received consideration and the purpose of the Commission has been to give carriers "a fair return upon the aggregate value" of their railway properties. Paragraph three as the Congress had a right to do, fixes for two years, thereafter leaving the matter to the Commission, a minimum per centum of such aggregate value which shall be taken "as such fair return." Paragraph four contains provisions guiding in a determination of "such aggregate value." Paragraph five is an explanation and attempted justification for the provisions of paragraph six which gives the Commission power to recover and receive one-half of "net railway operating income in excess of six per centum for the purpose of establishing and maintaining a general railroad contingent fund." The remaining paragraphs of the section regulate the disposition of excess income and the contingent fund.

**§ 77. Commission May Suspend an Advance in Rates.**—Heretofore the carriers could make any increase in rates or any change in regulations however unjust, and the Interstate Commerce Commission could not stay the advance or prohibit the regulation until after a long delay, during which an investigation was had. Some of the Circuit Courts and Circuit Courts of Appeals held that an illegal advance could be enjoined, other courts held the contrary and the Supreme Court has never determined the question. The amendments of 1910 and 1920 provide that the operation of such advance or regulation may be suspended or deferred by the Interstate Commerce Commission until after an investigation by the Commission. A Senate Committee had in 1906 reported against giving such power to the Commission, and it must be admitted that this power in the Commission was a fundamental departure in the regulation of common carriers. Theretofore the right of the carrier to initiate rates was not subject to the control of the Commission, since, while the carrier may initiate a rate or regulation such right is subject to the control of the Commission. This law prevents the delay and injury which shippers suffered, who had theretofore to file their complaint against an illegal advance and rely on the tiresome, expensive and inadequate remedy by reparation. Section fifteen, as amended, gives the shipper certain rights with reference to through routes and prohibits carriers and their agents from

giving information with reference to shipments. The burden of proof to show the justness and reasonableness of an advance is on the carrier. This burden was on the carrier prior to the Act of 1910, when a rate long in existence was advanced, although there have been some opinions expressed to the contrary. The Interstate Commerce Commission in the case of *Memphis Cotton Oil Co. v. Illinois Cent. R. Co.*, 17 I. C. C. 313, while not repudiating the doctrine above, states it less clearly than some of the prior decisions of the Commission. It is a fundamental law that acts of an individual are presumptively not contrary to his interests, and as said by Wallace, Judge, in *Menacho v. Ward*, 27 Fed. 529, 532: "The estimate placed by a party upon the value of his own services or property is always sufficient, against him, to establish the real value; but it has augmented probative force, and is almost conclusive against him, when he has adopted it in a long-continued and extensive course of business dealings."

**§ 78. Reports of Carriers.**—Paragraph two of section twenty of the Act of 1906 is stricken by the Act of 1910, and in lieu thereof a new paragraph is enacted, giving the Commission power to require annual reports for the year ending either June thirtieth or December thirty-first of each year, instead of June thirtieth only as was provided by the old law, and also giving power to the Commission in addition to the annual and monthly reports, to require of carriers "periodical or special" reports.

The Transportation Act 1920 uses some more words in describing what the Commission may require as to the forms of accounts, records, and memoranda kept by the carriers, specifically regulates charges for depreciation and gives the Commission power to require annual reports for the year ending in all documents, papers and correspondence now or hereafter existing, and kept or required to be kept by carriers."

**§ 79. Court Procedure with Reference to the Orders of the Commission.**—The Commission is given power to apply to the courts to enforce its orders. Writs of mandamus may issue

84. Sec. 432, *post*. *Smith v. Int.* 135, 38 Sup. Ct. 34.  
Com. Com., 240 U. S. 33, 62 L. Ed.

from the district courts of the United States to compel the movement and transportation of freight without undue discrimination, and to compel the furnishing of cars and other facilities of transportation. Suits to enforce orders for reparation, after an order therefor has been granted by the Commission, may be brought in the Federal or the State courts. Under certain circumstances, courts may suspend or set aside the orders of the Commission. What these circumstances are will be discussed hereinafter in Chapter VII.

### CHAPTER III.

#### ALL CHARGES FOR SERVICES RENDERED BY COMMON CARRIERS IN THE TRANSPORTATION OF PERSONS OR PROPERTY OR IN CONNECTION THEREWITH MUST BE JUST AND REASONABLE.

- § 80. All Charges Must Be Reasonable.
- 80a. Rule Applies to Accessorial Services.
- 81. Classification.
- 81a. Class and Commodity Rates.
- 82. Cost of Carrier's Equipment.
- 83. Cost of Carrier's Equipment. What Is a Reasonable Return.
- 84. Same Subject. Difficulties in Determining the Question.
- 85. Cost of Service.
- 86. Cost. When Carrier's Duty to Furnish Service.
- 87. Cost of Service. Continued.
- 88. Value of Service.
- 89. Same Subject. Use to Which Commodity Put.
- 89a. Cost of Assembling Theory.
- 90. Value of the Commodity, Its General Utility and Danger of Loss.
- 91. Value of the Commodity. Difference Between the Raw and the Manufactured Product.
- 92. Competition or Its Absence Considered in Determining Reasonable Rates.
- 93. Same Subject.
- 94. Same Subject. Rule Since 1910.
- 95. Same Subject. Conclusion.
- 96. Rates Affected by Amount of Tonnage.
- 97. Same Subject. Limitations on Rule.
- 98. Density of Traffic.
- 99. Distance and Rate per Ton Mile.
- 99a. Extra Line Haul.
- 100. General Business Conditions.
- 101. Estoppel.
- 102. Rates Long in Existence Are Presumed to Be Reasonable.
- 103. Same Subject.
- 104. Voluntary Reduction of Rates.
- 105. Same Subject. Act June 18, 1910.
- 106. Grouping Territory and Giving Each Group Same Rate Legal under Some Circumstances.
- 107. Grouping Producing Points and Making Zones Taking Same Rates.
- 108. Basing Point System.

109. Same Subject. Breaking Rates.
110. Comparison Between Different Lines as a Means of Determining Correct Rate.
111. Car Load and Less than Car Load Movements as Affecting the Rate.
112. Establishing Car Load Rates.
113. Same Subject. Rule in Duncan Case Criticised.
114. Same Subject. Proper Differential Between Rates on Car Load and Less than Car Load Freight.
115. Car Load Minima.
116. Train Load Rates.
117. Relation of Through Rates to the Sum of Local Rates.
118. Proportional Rates.
119. Through Rate Must Not Exceed Aggregate of Intermediate Rates.
120. Through Routes and Joint Rates.
121. Same Subject. Amendments of 1910 and 1912.
122. Rates on Commodities Requiring Refrigeration.
123. Rates on Returned Shipments.
124. The Public Interest Must Be Considered in Making Rates.
125. General Principles Applicable to the Question. What Is a Reasonable Rate?
126. Same Subject. Some Statements of the Commission as to Such General Principles.
127. Same Subject. Illustrative Cases.
128. Same Subject. Discussion of Principles in Chicago Live Stock Exchange Case.
129. Same Subject. Rate Considered in and of Itself.
130. Same Subject. Commission Not Bound by Technical Rules.
131. Same Subject. Summary.

§ 80. **All Charges Must Be Reasonable.**—At common law and under the Interstate Commerce Act all charges made by common carriers for any service rendered, or to be rendered, in the transportation of persons or property, or in connection therewith, are required to be just and reasonable, and every unjust and unreasonable charge for such service, or any part thereof, is prohibited and declared unlawful.<sup>1</sup> This principle of law necessarily arises from the franchises and practical monopoly incident to the business of common carriage. The principle is not new, but as has been held by the courts

1. *Post*, Sec. 339. Interstate Com. Com. v. Cincinnati, N. O. & T. Ry. Co., 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Sup. Ct. 896. The

transmission of messages by telegraph, telephone and cable are also subject to the rule of reasonableness.

for over two hundred years when private property is "affected with a public interest, it ceases to be *juris privati* only." Mr. Chief Justice Waite, speaking of governmental regulation of public carriers, said:

"This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the constitution protects, we find that when private property is affected with a public interest, it ceases to be *juris privati* only. This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. L. Tr., 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

What is a "just and reasonable" charge is not always easily determinable, but that is the *desideratum* sought by the law. Whether or not a particular rate on a single commodity is in and of itself just and reasonable cannot be demonstrated.\* Certain principles and presumptions have been made use of by the courts and commission in determining cases that came before them, but it cannot be claimed that rate making is a science. Very early in its history, the commission expressed the difficulty of determining what constituted a just rate as follows:

2. *Munn v. Illinois*, 94 U. S., 4 Otto 113, 24 L. Ed. 77, 84. Mr. Justice Hill of the Supreme Court of Georgia traced the principle of regulation back to *Hamurabi*; see *Stephens v. Central* of Ga. Ry. Co., 138 Ga. 625, 75 S. E. 1041, 42 L. R. A. (N. S.) 541, 1913E, Ann. Cas. 609.
3. *National Hay Asso. v. Lake Shore & M. S. R. Co.*, 9 I. C. C. 264, 303, 304, 305.

"The question of the reasonableness of rates is always a perplexing one. A great variety of considerations are necessarily involved in each instance. Theory and conjecture merely are not enough. A comparison of one isolated rate with another is not sufficient. The whole field must be considered in order to approximate justice, and at best the result cannot be regarded as other than an approximation."

In the 1910 Western Rate Advance case<sup>4</sup> Mr. Commissioner Lane discussed the principles from which could be determined what is a reasonable rate and in concluding the opinion of the Commission in that case said: "We are dealing here with a difficult problem, involving multitudinous facts and an infinite variety of modifying conditions, which make the establishment of principles and the framing of policies a matter of slow evolution."

Some of the principles announced by the courts and the commission will be stated in the next succeeding sections.

**§ 80A. Rule Applied to Accessorial Services.**—It will be noted that the charges "in connection" with transportation are included within the requirement of reasonableness. The same reason applies to charges for demurrage,<sup>5</sup> refrigeration,<sup>6</sup> delivery,<sup>7</sup> terminal charges,<sup>8</sup> as well as any other charges made for any service connected with transportation. The Supreme Court, however, has held, reversing the Commission and the lower courts, that carriers are entitled, for a service and expense in stopping goods in transit, to compensation in addition to the actual expenses incurred.<sup>10</sup> Many services in connection with the receipt, delivery, elevation and transfer in transit,

4. *Howell v. New York, L. E. & W. R. Co.*, 2 I. C. C. 272, 2 I. C. R. 162.

5. *Advances in Rates, Western Case*, 20 I. C. C. 307.

6. *Penn Millers' Asso. v. Philadelphia & R. R. Co.*, 8 I. C. C. 531, 558.

7. *Re Charges for Transportation and Refrigeration of Fruit*, 11 I. C. C. 129, *Knudson-Ferguson Fruit Co. v. Mich. Cent. R. Co.*, 148 Fed. 968, 79 C. C. A. 483.

8. *St. Louis Hay & Grain Co. v. Chicago, B. & Q. R. Co.*, 11 I. C. C. 82, 87.

9. *Int. Com. Com. v. Chicago, B. & Q. R. Co.*, 186 U. S. 320, 342, 46 L. Ed. 1182, 22 Sup. Ct. 824; *Cattle Raisers' Asso. v. Chicago, B. & Q. R. Co.*, 12 I. C. C. 507.

10. *Southern Ry. Co. v. St. Louis Hay & Grain Co.*, 214 U. S. 297, 53 L. Ed. 1004, 29 Sup. Ct. 678.

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ventilation, refrigeration or icing (including heating), storage and handling of property transported,<sup>11</sup> are not separately charged for but the charge is included in the general charge for the line haul. The Supreme Court has "decided that, as for a through rate to a given point, the carrier contracted to deliver at that point, the presumption was that the through rate included adequate compensation for the services rendered at the point of delivery."<sup>12</sup>

In the Five Per Cent Case, 31 I. C. C. 351 the Commission expressed the view that every service should be charged for; and later in referring to this view, Mr. Commissioner Harlan spoke of the soundness of the principle and the propriety of its application.<sup>13</sup> Unquestionably all services should be charged for at a reasonable rate; but as stated, the charge for the accessorial service is frequently included in the charge for the principal service. The objection to one charge is that only some of the shippers receive the accessorial service; and when there is only one charge, all the shippers pay the same charge. This is a preference to the shipper who receives the accessorial services and a disadvantage to the shipper who gets no such service, but pays the same rate as the shipper who does.

Insurance premiums on property stored by the carrier in a public warehouse pending acceptance by a consignee are no part of transportation and not subject to regulation by the Commission.<sup>14</sup>

§ 81. **Classification.**—Classification of commodities for rate making is adopted in prescribing rates. Most traffic, especially the more valuable articles, moves under classified rates; the heavier articles are given what is called commodity rates. There are in the United States several different classifications. Confusion and sometimes unjust discrimination result from these different classifications when the traffic moves

11. Sec. 337, *post*.

12. *Covington Stock Yards v. Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 Sup. Ct. 461, Int. Com. Com. v. Chicago, B. & Q. R. Co., 186 U. S. 320, 336, 46 L. Ed. 1182, 1191, 22 Sup. Ct. 824; *Duluth Dockage Absorption*, 44 I. C. C. 300, 302.

13. *Cheese Dealers Asso. Co. v.*

*A. T. & S. F. Ry. Co.*, 40 I. C. C. 1, 3.

14. *Cotton Seed Products Co. v. St. L. S. F. Ry. Co.*, 53 I. C. C. 574.

through territory where different classification rules and descriptions apply. Efforts have been made by representatives of the carriers and commissions, national and state, to remedy this condition by the adoption of a uniform system of classification. In some sections there are commodities which do not exist in others. Long existing systems in reliance upon which business has been established and prospered, are facts which make difficult a solution of the problem. But it is not, as said by Mr. Commissioner Lane, "fanciful to say" that a solution may be arrived at. The learned Commissioner in the same connection stated some principles which must be considered. He said: "Supplement cost with scientific classification of freight \* \* \* and we have something certainly more nearly akin to reason than the hazard of a traffic manager, no matter how benevolently inclined."<sup>15</sup>

It is the duty of carriers subject to the act to regulate commerce "to establish, observe and enforce reasonable classification of property for transportation," and the commission may "enter upon a hearing concerning the propriety of such \* \* \* classification." "May determine and prescribe what will be the just and reasonable, \* \* \* individual or joint classification."<sup>16</sup> Classification like the other details in rate making is not an exact science.<sup>17</sup> In framing classifications and rates, no one consideration is controlling. Bulk, value, liability to waste or injury in transit, weight, form in which tendered, etc., must be taken into consideration.<sup>18</sup> All classifications must be made with due regard to these and kindred considerations. Market conditions and the promotion of competition are also facts which are considered. Classification must not, of course, be made to benefit one, or a few shippers and must be without discrimination.<sup>19</sup> The Interstate Com-

15. *Advance in Rates, Western Case*, 20 I. C. C. 307, 362.

16. *Sec. 395, post. Re Advances on Coal to Lake Ports*, 22 I. C. C. 604, 623, 624.

17. *Forest City Freight Bureau v. Ann Arbor R. Co.*, 18 I. C. C. 205, 206.

18. *Ford Co. v. Michigan Central R. Co.*, 19 I. C. C. 507, 509, *Yaw-*

*man & Erbe Mfg. Co. v. Atchison, T. & S. F. R. Co.*, 15 I. C. C. 260, 262.

19. *McClung & Co. v. Southern Ry. Co.*, 22 I. C. C. 582, 584; *Sutherland Bros. v. St. Louis & S. F. R. Co.*, 23 I. C. C. 259, 262. The difficulties encountered in making rates between different classification territories are dis-

merce Commission in the Western Classification case<sup>20</sup> dealt at length with the general subject. The opinion of the Commission, written by Mr. Commissioner Meyer, begins with the statement that classification is a public function, and that committees engaged in making or changing classifications should conduct their business as public, giving full information to shippers and Commissioners, state and national, that there may be opportunity for public hearings. Further principles were stated: "For years past the Western Classification Committee has complied to a certain extent what are designated classification units. These units as complied are a combination or sum of unlike parts, but may be expressed with equal propriety as a product composed of unlike factors. They are intended to express the relation to one another of weight, space, and value. While a unit test of this character may not finally determine the classification of an article, it constitutes a basis for comparison with other articles. When all the modifying conditions and facts are known, a fair classification relation may be established among articles through the aid of this classification unit. A compilation of classification units just as far as practicable for every item in the classification would doubtless be of substantial value in the present formative work. The classification is in an inchoate state. Perhaps every classification must remain so. Constant change appears to be inherent in industrial life." In discussing the rules which should apply in making a uniform classification, it was said: "The uniform classification must be worked out without an attempt to affect revenues. Classification and rates and revenues should be kept entirely separate. There will doubtless be many coincidences in which the present rate applied to the new classification will bring about the exact transportation charge which results from the old rate applied to the old classification. In other cases the rate must be advanced or reduced, depending upon the change in the classification of the article in order to protect existing revenues. This is entirely without reference to the sufficiency or insufficiency of present revenues,

cussed in *Interior Iowa Cites R. Co.*, 39 I. C. C. 256.  
 Case, 28 I. C. C. 64, 72, and in 20. *Western Classification Case*,  
*Memphis v. Chicago R. I. & P.* 25 I. C. C. 442.

which is a distinct and very different question. It would only complicate and confuse matters to attempt, through the instrumentality of the classification, to bring about a revision in rates and charges. Whether a rate is too high or too low should be made a separate issue distinct from classification. Nevertheless, as far as possible, the establishment of ratings and the publication of rates should follow changes in the classification very closely. A classification is a universal tariff from which the schedules of individual carriers should not depart, except in cases demanded by special conditions. Commodity tariffs in restricted numbers will probably always remain a necessity."

In the 1915 Western Rate Advance Case,<sup>21</sup> F. H. Millard, a witness for the Interstate Commerce Commission, presented the result of studies seeking to measure the extent to which the value of the commodity should constitute a norm in rate-making and rate-judging. These studies are shown in the appendix to the report of the Commission in that case.

The Consolidated Classification Case, which is Volume 54 of the Commission's reports, combines and to some extent makes uniform, the several classifications. Perishable Freight Investigation 56 I. C. C. 449-671 is a further step towards uniformity.

Classification descriptions must necessarily be somewhat general and cannot go into minute details.<sup>22</sup>

In classification certain rates are made from territories described with a fixed relationship. These territories are called "defined territories" and are described and mapped in 38 I. C. C. 153, 154.

§ 81A. **Class and Commodity Rates.**—The number of classes varies in the three general classifications and in such state classifications as exist. So also the relationship of the several classes differs in the different classifications and sometimes in the same classification. The Commission in Consolidated Classification Case 54 I. C. C. 11, said: "While it is possible to re-

21. Western Rate Advance Case 1915, 35 I. C. C. 497.

22. Casket Mfrs. Assn. v. B. & O. R. R. Co., 49 I. C. C. 327; Acme Belting Co. v. A. & R. Co., 52 I. C.

C. 15, 17. See for factors to be considered, National Society of Records v. A. & R. R. Co., 40 I. C. C. 347, 355, and Sec. 161, *post*.

move many of the present inconsistencies without changes in rate scales, it should also be borne in mind that an absolutely uniform classification could be prepared and proposed only in connection with a universal system of rate scales having a uniform number of classes. In our view a desirable arrangement would be to have in each scale at least ten classes related somewhat as shown below; practically all less-than-carload traffic, to be confined to the first four classes, and a redistribution made of the articles in the carload classes:

Classes . . . . .	1	2	3	4	5	6	7	8	9	10
Percentages . . .	100	85	70	60	45	35	30	25	22½	20

Many articles that now move under commodity rates and under exceptions to the classifications could be assigned ratings in such a scale that would result in the application of rates not substantially higher or lower than now apply."

The greater number of commodities are given class rates. Some commodities moving in large volume are assigned rates applicable especially to the named commodity. These are called "Commodity Rates;" and, as a rule, are lower than the class rate on the same commodity." As said by the Commission, "There can be no question about the propriety of commodity rates where conditions justify such departures from the regular class rates."

§ 82. **Cost of Carrier's Equipment.**—Bonded indebtedness, operating expenses and dividends on the investment of the carrier all enter into the "cost of service" and should be considered, but the indebtedness and the stock upon which dividends are sought must represent actual obligations contracted in good faith and the expenses must be actual and reasonable." Mr. Commissioner Prouty," discussing this question, aptly says: "To make the capital account of our railroads the measure of their legitimate earnings would place,

23. Sulphuric Acid from New Orleans, 42 I. C. C. 200, 202 and cases cited.

24. Rates and Rules on shipments of Packing House Products, 36 I. C. C. 62, 69.

25. *Dow v. Beidelman*, 125 U. S. 680, 31 L. Ed. 841, 8 Sup. Ct. 1028.

Re Alleged Excessive Rates on Food Products, 4 I. C. C. 48, 116.

26. *Grain Shippers' Asso. v. Ill. Cent. R. Co.*, 8 I. C. C. 158, 182. See also *Re Proposed Advance in Freight Rates*, 9 I. C. C. 382, where is found a full discussion of the question.

as a rule, the corporation which has been honestly managed from the outset under enormous disadvantages." What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience." In considering the value of the property employed in serving the public, it must be remembered that such a test is not absolute and, at times, yields to the public interest and the rule as to the value of service, both of which are discussed hereinafter. The cost and value of the railroad properties are among the various facts which may be considered in determining what in a particular case constitutes a reasonable rate.

The value of property employed for the public convenience is an important element in determining the reasonableness of a whole schedule of rates. It can be of little value in determining the reasonableness of rates on a particular commodity. This is true because no method has ever yet been devised by which the cost of moving a particular commodity can be determined. Whether or not such commodity is bearing its proper proportion of the charges that must be received to make "a fair return" to the carrier is a question that can not yet, if ever, be answered. It is true that certain out-of-pocket expenses can be allocated, but the proportion of the cost of maintenance, general superintendence and other general expenses which should be charged against a particular movement can not be determined with any degree of certainty. The rule announced in *Smyth v. Ames supra*, is as follows:

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the conveyance of the public. And, in order to ascertain that value,

27. *Smyth v. Ames* (Nebraska Freight Rate Case), 169 U. S. 446, 42 L. Ed. 819, 18 Sup. Ct. 418; *Covington & Lexington Turnpike R. Co. v. Sandford*, 164 U. S. 578, 41 L. Ed. 560, 17 Sup. Ct. 198; *Knoxville v. Knoxville*

*Water Co.*, 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. 148; *Brabham v. Atlantic C. L. R. Co.*, 11 I. C. C. 464, 473; *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. Ed. 382, 29 Sup. Ct. 192, 15 Ann. Cas. 1034.

the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

It should be kept in mind that this oft quoted rule formulated by the Supreme Court was announced in a suit to enjoin an act "To Regulate Railroads, to Classify Freights, to Fix Reasonable Maximum Rates to be Charged for the Transportation of Freights upon Each of the Railroads in the State of Nebraska, and to Provide Penalties for the Violation of this Act." While the rule is a correct rule of law, as limited by the last sentence of the foregoing quotation, when considered in reference to a general schedule of rates, it cannot be practically applied to a particular rate. Even with reference to a general schedule of rates it should be construed in connection with the decision of the case of *Covington & Lexington Turnpike R. Co. v. Sanford*,<sup>28</sup> where the same distinguished Judge, Mr. Justice Harlan, who wrote the opinion in *Smyth v. Ames*, said:

"It is proper to say that if the answer had not alleged, in substance, that the tolls prescribed by the Act of 1890 were wholly inadequate for keeping the road in proper repair and for earning dividends, we could not say that the act was unconstitutional merely because the company (as was alleged and as the demurrer admitted) could not earn more than 4 per cent on its capital stock. It cannot be said that a corporation operating a public highway is entitled, as of right, and with-

28. *Supra*, note 27.

out reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turn-pike road, and consequently, a diminution in the tolls collected, that is not in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use its property. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The legislature has the authority in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the constitution does not require to be remedied by imposing unjust burdens upon the public."

Value given to property by reason of its excessive earning power should not be considered, although the reasonable value of a franchise is an element in arriving at the total value of property.

The amendment giving to the Interstate Commerce Commission jurisdiction to make a valuation of the carrier's property" will, when the work thereunder is completed, furnish a valuation which can be used in rate-making and rate-judging. In the meantime the "cost of road and equipment" furnishes

a "usable" basis which the Commission applies.<sup>30</sup> In rate-judging and rate-making by an administrative body performing the legislative function of determining what shall be the rate for the future, a different question is presented from that which arises when a court has for determination the question of the confiscatory character of a rate prescribed by a *quasi*-legislative tribunal. The Commission may and should consider all questions affecting the movement of the particular traffic, such as competition, classification, the public interests, and all of the elements which enter into the general question of reasonableness. In considering the questions so presented, Commissioners have to survey a wider field and have greater latitude than the courts, which are limited to the question, does the rate involved constitute in substance the taking of property without due compensation. This question is discussed, sec. 46 *supra*.

The principles stated are not changed by Transportation Act 1920, Section 15a; but that section gives additional details in stating the principles.

§ 83. **Cost of Carrier's Equipment—What Is a Reasonable Return.**—On the question of what is a reasonable return, the Supreme Court has said:<sup>31</sup>

"There is no particular rate of compensation which must in all cases and in all parts of the country be regarded as sufficient for capital invested in business enterprises. Such compensation may depend greatly upon circumstances and locality; among other things, the amount of risk in the business is a most important factor, as well as the locality where the business is conducted and the rate expected and usually realized there upon investments of a somewhat similar nature with regard to the risk attending them. There may be other matters which in some cases might also be properly taken into account in determining the rate which an investor might properly expect or hope to receive and which he would be entitled to without legislative interference. The less risk, the less right to any unusual returns upon the investment."

<p>30. Advances in Rates, Eastern Case, 20 I. C. C. 243, Western Case, 20 I. C. C. 307; Five Per Cent Case, 31 I. C. C. 351, 32 I. C. C.</p>	<p>325; Western Rate Advance Case 1915, 35 I. C. C. 497. 31. <i>Supra</i> Note 27, this chapter, Consolidated Gas Co. case.</p>
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In this case the whole schedule of rates was involved and six per cent was held to be reasonable, the court saying: "Taking all facts into consideration, we concur with the court below on this question, and think complainant is entitled to six per cent on the fair value of its property devoted to the public use."

In the Knoxville Water Case," the Supreme Court announced a rule as to depreciation as follows:

"Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that at the end of any given term of years the original investment remains as it was at the beginning. It is not only the right of the company to make such a provision, but it is its duty to its bond and stockholders, and, in the case of a public service corporation at least, its plain duty to the public. If a different course were pursued the only method of providing for replacement of property which has ceased to be useful would be the investment of new capital and the issue of new bonds or stocks."

The rule has no application to the rates charged by express companies. Mr. Commissioner Preuty said:"

"In passing upon an entire schedule of railway rates (and when in this proceeding we pass upon the base rate of these defendants we really consider their entire schedule) the controlling factor is the value of the property which is devoted to the public service. The cost of originally producing or of reproducing that property is an important consideration, as is also the capitalization of the company and the value of its securities. In revising the rates of these express companies these considerations can have but little weight, since there is no real relation between the value of the prop-

32. *Supra*, Note 27, this chapter.

33. *Kindel v. Adams Express Co.*, 13 I. C. C. 475, 485.

erty and the service performed, nor in the case of these companies, between their capital stock and just earnings."

Increased cost of labor and equipment makes the cost of service higher, but this is generally offset by increased efficiency. This question is interestingly discussed and valuable tables given in the case of *Re Class and Commodity Rates from St. Louis to Texas Common Points*, 11 I. C. C. 238, *et seq.*, and in Sec. 47 *supra*, other cases are cited and discussed.

The Transportation Act, 1920, Section 15a, paragraphs 3 to 6 prescribe for "carriers as a whole or as a whole" in each \* \* \* rate" group a standard of 5½ per centum as a minimum which shall constitute until March 1, 1922 a fair return on the "aggregate property value." The Commission may after March 1, 1922 change this percentage.

§ 84. **Same Subject. Difficulties in Determining the Question.**—It is easy to state the fundamental rule announced in *Smyth v. Ames*, *supra*, that the fair value of the property used for the public convenience shall be taken as a basis for determining the reasonableness of a schedule of rates, but the difficulty arises in determining what is a "fair value"—Who is to fix this value? What fact must of necessity be considered in arriving at this determination?

Primarily the rate-making body must determine what the fair value is, and such determination has a force which the courts must regard. In the *Minnesota Rate cases*,<sup>34</sup> the Supreme Court said: "The rate-making power is a legislative power, and necessarily implies a range of legislative discretion. We do not sit as a board of revision to substitute our judgment for that of the Legislature, or of the commission, lawfully constituted by it, as to matters within the province of either." While this is true, neither a legislature nor a commission can confiscate the property of a public utility company, and the courts must therefore determine, when properly applied to, whether or not a particular rate or schedule of rates violates the constitutional rights of the carrier or other person or corporation engaged in a public

34. *Simpson v. Shepard*, 230 U. S. 352, 433, 434, 57 L. Ed. 1511, 33 Sup. Ct. 729, citing *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 446, 47 L. Ed. 892, 23 Sup. Ct. 571.

service, whose rates have been prescribed by the legislature, or under its authority. Congress has empowered the Interstate Commerce Commission to make a physical valuation of railroads, but to do this will require years and even when it is done the question will not be entirely settled. In the Minnesota Rate cases, *supra* much testimony was taken as to value, relative cost, expenses, etc., but the Supreme Court rejected the proof as not adequate—the Court did however announce certain general and fundamental principles. It was there held that (1) the basis of the calculation is the fair value of the property, used for the convenience of the public; (2) that such value was not to be determined by arbitrary rules, but cost of construction of improvements, the market value of stock and bonds, the present as compared with the original cost of construction the probable earning capacity under the rates prescribed must be considered. And after quoting from *Smyth v. Ames* the Court concluded “We do not say there may not be other matters to be regarded in determining the value of the property.” And when a carrier is engaged in both interstate and intrastate transportation, and a rate is prescribed for intrastate movements the court announced a third principle as follows: The question “must be determined by considering separately the value of the property employed in the intrastate business, and the compensation allowed in the business under the rule prescribed.”

In the *Indiana case*<sup>35</sup> further emphasis was given to the fact that prescribing rates was a legislative function, and when rates are so prescribed by a lawfully authorized tribunal the carriers seeking to set them aside must make definite and satisfactory proof.

In the 1910 *Western Rate Advance* case it was contended upon the part of one of the carriers that “it is immaterial how the property was acquired, what it originally cost, whether the present value may be claimed to be in part the result of earnings put back into the property in betterments or is due to growth of traffic and development of the country serv-

35. *Wood v. Vandalia R. Co.*, 231 U. S. 1, 58 L. Ed. 97, 34 Sup. Ct. 7.

ed.”<sup>36</sup> This contention was denied by the Commission, Mr. Commissioner Lane saying:

“Notwithstanding these decisions, it remains for the Supreme Court yet to decide that a public agency, such as a railroad created by public authority, vested with governmental authority, may continuously increase its rates in proportion to its value, either (1) because of betterments it has made out of income, or (2) because of the growth of the property in value due to the increase in the value of the land which the company owns.”

This answer is fully supported by the subsequent decision of the Supreme Court in the Minnesota Rate Cases and other like state rate cases decided about the same time.” This principle must not, however, be given too broad an application. Construed in the light of the decisions cited it does not deny a carrier returns on investments merely because such investments may have been made from earnings or may have resulted from an increase in the value of the original investment, but the principle would prevent charging unreasonable rates even though such rates were necessary to earn a fair return on the investment.

§ 85. **Cost of Service.**—The value of the equipment of a common carrier, is an element in determining what it costs to transport any particular commodity, and what such cost is, that is the “cost of service,” is a fact that is properly considered in determining what is a reasonable and just rate to

36. *Advances in Rates, Western Case*, 20 I. C. C. 307, 339. In support of this claim these cases were cited: *Ames v. Union Pac. Ry. Co.*, 64 Fed. 165; *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047; *Missouri, K. & T. Ry. Co. v. Love*, 177 Fed. 493; *Kennebec Water Co. v. Waterville*, 97 Me. 185, 54 Atl. 6; *National Water Works Co. v. Kansas City*, 62 Fed. 853; *Metropolitan Trust Co. v. Houston & T. C. R. Co.*, 90 Fed. 683; *San Diego Land &*

*Town Co. v. National City*, 74 Fed. 79; *Matthews v. Board of Commissioners*, 106 Fed. 9.

37. *Simpson v. Shepard—Minnesota Rates Cases*—230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729; *Knott v. Chicago, B. & Q. R. Co.—Missouri Rate Cases*—230 U. S. 474, 57 L. Ed. 1571, 33 Sup. Ct. 975; *Chesapeake & O. R. Co. v. Conley—West Virginia Rate Cases*—230 U. S. 513, 57 L. Ed. 1597, 33 Sup. Ct. 985; *Southern Pac. Co. v. Campbell*, 230 U. S. 537, 57 L. Ed. 1610, 33 Sup. Ct.

be charged." This item will be seen referred to by the Interstate Commerce Commission frequently in its opinions determining whether or not the rates under discussion are or are not reasonable. The Supreme Court, speaking of the commission, said: "The tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers."<sup>38</sup> In considering a proposed advance in freight rates,<sup>40</sup> Mr. Commissioner Prouty first considers the question "is the rate reasonable, estimated by the cost and value of the service?" In another case,<sup>41</sup> Mr. Commissioner Clements said: "The test of the reasonableness of a rate is not the amount of the profit in the business of the shipper or manufacturer, but whether the rate yields a reasonable compensation for the services rendered." Cost of service, however, cannot be made an absolute guide in fixing rates. District Judge Bethea<sup>42</sup> well says: "The cost of service to a carrier would be an ideal theory, but it is not practicable. Such cost can be reached approximately, but not accurately enough to make this factor controlling. It is worthy of consideration, however." Judge Clements expressed the rule of the commission as follows:<sup>43</sup>

1027; *Oregon R. & Nav. Co. v. Campbell—Oregon Rate Cases*—230 U. S. 525, 537, 57 L. Ed. 1604, 33 Sup. Ct. 1026; *Allen v. St. Louis, I. M. & S. Ry. Co.—Arkansas Rate Cases*—230 U. S. 553, 57 L. Ed. 1625, 33 Sup. Ct. 1030; *Wood v. Vandalla R. Co.—Indiana Rate Case*—231 U. S. 1, 58 L. Ed. 97, 34 Sup. Ct. 7; *Louisville & N. R. Co. v. Garrett—Kentucky Rate Case*—231 U. S. 298, 58 L. Ed. 229, 34 Sup. Ct. 48. See also Sec. 46 *supra* and notes 45, 54 and 55 this chapter.

38. *Re Alleged Excessive Rates on Food Products*, 4 I. C. C. 48, 3 I. C. R. 93; *Schumacher Milling Co. v. Chicago, R. I. & P. Ry. Co.*, 6 I. C. C. 61, 4 I. C. R. 373; *Re Proposed Advances in Freight Rates*, 9 I. C. C. 382; *Int. Com.*

*Com. v. Chicago G. W. Ry. Co.*, 141 Fed. 1003, 1015. *Separation of Operating Expenses*, 30 I. C. C. 676, 678; *Coal Rates from Virginia*, 30 I. C. C. 635, 646; and cases cited.

39. *Tex. & Pac. Ry. Co. v. Int. Com. Com.* 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666, 5 I. C. R. 405.

40. *Re Proposed Advance in Freight Rates*, 9 I. C. C. 382.

41. *Central Yellow Pine Asso. v. Ill. Cent. R. Co.*, 10 I. C. C. 505.

42. *Int. Com. v. Chicago Great W. R. Co.*, 141 Fed. 1003, 1015, and cases cited. *Affirmed*, same style case, 209 U. S. 108, 52 L. Ed. 705, 28 Sup. Ct. 493.

43. *Cannon v. Mobile & O. R. Co.*, 11 I. C. C. 537, 542.

"While in the relative adjustment of rates as between places on its line a carrier cannot rightfully ignore the relative cost to it of the respective services rendered by it, and since it ordinarily costs more to haul freight a longer distance than a shorter one, the carrier cannot rightfully ignore substantial differences in distance where all other circumstances and conditions are equal, or substantially similar. There are other matters of equal importance to that of cost of the service and often more controlling which must also be considered. Among these is competition both of carriers and of markets. The greater the inequality or dissimilarity in other potent circumstances or conditions the less controlling becomes the matter of relative cost."

In determining the cost of service Mr. Commissioner Clements said: "Expenditures for additions to construction and equipment should be reimbursed by all the traffic they accommodate during the period of their duration, and improvements that will last many years should not be charged against the revenue of a single year." "The principle, however, must be applied in connection with the holding in the Knoxville Water Co. case," that earnings should be sufficient to pay a reasonable return on the property employed in the public service and provide against depreciation. "Cost of service," could not, in any event require an unreasonable rate, and, under some circumstances, a carrier may be compelled to perform a particular service to the public at an actual loss.

The Transportation Act of 1920 prescribes as something to be accomplished a definite return for the use of capital. Here the Congress has said that all the cost of service shall be paid by all the shippers, and that included in this cost there must be a definite return to the investor. Elsewhere in the 1920 Act are repeated provisions of the original Act requiring that all charges must be reasonable. The Congress has now made one factor, "fair return" on capital invested, an essential part of a reasonable rate, practically

44. Central Yellow Pine Assn. v. Ill. Cent. R. Co., 10 I. C. C. 505; Ill. Cent. R. Co. v. Int. Com., 206 U. S. 441, 461, 51 L. Ed. 1128, 1136, 27 Sup. Ct. 700.

45. Knoxville v. Knoxville Water Co., 212 U. S. 1, 53 L. Ed. 371, 20 Sup. Ct. 148.

guaranteeing that the sum of all rates shall yield a fair return on the sum of all investments or all investments in each rate group. There is yet undetermined what portion of this "fair return" must come from each particular service. The problem of what constitutes a reasonable rate on one or a few commodities is not simplified by this 1920 legislation."

§ 86. **Cost—When Carrier's Duty to Furnish Service.**—In *Atlantic C. L. R. Co. v. North Carolina Corporation Commission*" the Supreme Court had under consideration an order of the North Carolina Commission requiring the carrier to make a particular connection with certain passenger trains. To do this the carrier had to put on an extra train at a loss. The Supreme Court sustained the order of the North Carolina Commission, saying:

"But this case does not involve the enforcement by a state of a general scheme of maximum rates, but only whether an exercise of state authority to compel a carrier to perform a particular and specified duty is so inherently unjust and unreasonable as to amount to the deprivation of property without due process of law or a denial of the equal protection of the laws. In a case involving the validity of an order enforcing a scheme of maximum rates, of course the finding that the enforcement of such scheme will not produce an adequate return for the operation of the railroad, in and of itself, demonstrates the unreasonableness of the order. Such, however, is not the case when the question is as to the validity of an order to do a particular act, the doing of which does not involve the question of the profitableness of the operation of the railroad as an entirety. The difference between the two cases is illustrated in *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. Rep. 484, and *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. Rep. 900. But even if the rule applicable to an entire rate scheme were to be here applied, as the findings made below as to the net earnings constrain us to conclude

46. Sec. 48, ante; *Iron Ore Rates*, 41 I. C. C. 181, 193; *The Alaska Investigation* 44 I. C. C. 680, 693.

47. *Atlantic Coast Line R. Co. v. North Carolina Corp. Com.*, 206 U. S. 1, 24, 25, 51 L. Ed. 933, 944, 27 Sup. Ct. 585, 11 Ann. Cas. 398.

that adequate remuneration would result from the general operation of the rates in force, even allowing for any loss occasioned by the running of the extra train in question, it follows that the order would not be unreasonable, even if tested by the doctrine announced in *Smyth v. Ames* and kindred cases."

§ 87. **Cost of Service, Continued.**—That cost of service should be considered in determining the reasonableness of a rate or a schedule of rates is but a corollary of the proposition that each is intitled to his own, but this principle, like all abstract principles, must be regarded as merely a fact to be considered, and not an inflexible rule to be followed. The principle must be considered in connection with all the circumstances surrounding the transportation, the rate for which is sought to be determined. Regardless of cost of service, some traffic can and should bear a higher rate than other traffic; it is impossible to determine with accuracy the cost of moving a particular kind of traffic as under present systems of accounting, cost of each different service cannot be allocated. But, as was said by Mr. Commissioner Lane, "once we have learned the comparative cost for various services, it is not fanciful to say that a schedule of rates may be made which will approach justice as between services. Supplement cost with scientific classification of freight, giving their due to all the various factors, such as value, bulk, and hazard—especially to value—adding return for use of plant, and we have something certainly more nearly akin to reason than the hazard of a traffic manager, no matter how benevolently inclined. Such a theory gives force to every factor which the Supreme Court has said should be considered in the fixing of rates for public utilities. The investor would have his return, and the value of the property would be cared for as a part of the rate, though this return would of course vary with the rates as at present, one service making a larger return to capital than another."

But, until the facts suggested by the Commissioner are available, "the cost of the service" is one of the factors to be

considered in determining the reasonableness of rates. But, neither the cost of the service, nor any of the other factors, of which there are many, should be taken alone as conclusive,"<sup>49</sup> and this rule is not abrogated by the Transportation Act 1920.

Business conditions, the necessity for a rate lower than the one under which the traffic moves, its low value in comparison with its weight, and other considerations, make it proper that some traffic shall bear less than its proportion of the cost of service. Sometimes, were a particular traffic charged with its proportion of the cost of service, it would not move at all. The public welfare demands that such traffic shall move; the carrier loses nothing in conceding a low rate to such traffic if the rate exceeds, however little, the cut-of-pocket cost. The carrier's equipment must be maintained, and the general expenses must go on, even though the traffic does not move. These considerations underlie the statement of the Commerce Court:<sup>50</sup> "That relative freight rates have not been based upon the fair, proportionate cost or value of the service alone or in combination, is demonstrated by the entire history of freight classification. The carrier cannot complain of a violation of its constitutional rights if, not to favor some person or class, but for the general welfare, it is compelled to make a rate for some particular service which, though in excess of the out-of-pocket expense, would nevertheless be confiscatory, if it were applied to all its freight; that is, the carrier has no constitutional right to a rate for each distinct kind of service which will equal its proportionate share of the entire operating expense."

The language quoted from the opinion of the Commerce Court is susceptible of misconstruction, and it is not without significance that no similar statement appears in the affirming opinion of the Supreme Court. Limiting the language of the

49. Mr. Commissioner Clark in *Coke Producers Association of the Cornellsville Region v. Baltimore & O. R. Co.*, 27 I. C. C. 125, 140.

50. *Atchison, T. & S. F. Ry. Co. v. United States*, 203 Fed. 56, 59; *Commerce Court Opinion No. 61*, 537. *Lemon Rate Case*; affirmed

by the Supreme Court *Atchison, T. & S. F. Ry. Co. v. United States*, 231 U. S. 736. The statement of the Commerce Court quoted in the text was fortified by citing: *Minneapolis St. L. R. Co. v. Minnesota*, 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 900; *St. L. &*

Commerce Court as it was probably intended to be limited, to the meaning that an equal percentage over actual cost need not be fixed for the transportation of all commodities, the statement is a correct rule of law. That the rule must be limited as stated above, follows from the decision of the Supreme Court annulling rates on coal prescribed under the laws of North Dakota.<sup>51</sup> Those state rates paying no more than the actual cost to the carrier, were prescribed for the avowed purpose of enforcing a "public policy." The state presented the argument "that the rate was imposed to aid in the development of a local industry." Answering this contention, Mr. Justice Hughes, delivering the opinion of the court, said:

"While local interests serve as a motive for enforcing reasonable rates, it would be a very different matter to say that the state may compel the carrier to maintain a rate upon a particular commodity that is less than reasonable, or—as might equally well be asserted—to carry gratuitously, in order to build up a local enterprise. That would be to go outside the carrier's undertaking, and outside the field of reasonable supervision of the conduct of its business, and would be equivalent to an appropriation of the property to public uses upon terms to which the carrier had in no way agreed." The learned Justice, that there should be no misunderstanding of the rule, expressly referred to the principle that classification of commodities with different ratings thereon was permissible. He said: "The legislature undoubtedly has a wide range of discretion in the exercise of the power to prescribe reasonable charges, and it is not bound to fix uniform rates for all commodities, to secure the same percentage of profit on every sort of business. There are many factors to be considered—differences in the articles transported, the care re-

S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. 484; Atlantic C. L. R. Co. v. North Carolina Corp. Com., 206 U. S. 1, 51 L. Ed. 933, 27 Sup. Ct. 585, 11 Ann. Cas. 398. To the same effect see Texas & P. Ry. Co. v. R. R. Com. of La., 192 Fed. 280, 112 C. C. A. 528. 51. Northern P. R. Co. v. North Dakota, 236 U. S. 585, 59 L. Ed. 735, 35 Sup. Ct. 429. See also Norfolk & W. R. Co. v. Conley, 236 U. S. 605, 59 L. Ed. 745, 35 Sup. Ct. 437.

quired, the risk assumed, the value of the service, and it is obviously important that there should be reasonable adjustments and classifications." Nothing in this decision conflicts with the decision in the North Carolina case, note 47 *supra*, this chapter. There the carrier was compelled to perform an absolute duty although in doing so for a reasonable charge there was a loss. In the North Dakota case the court held that less than a reasonable rate could not be required of the carrier.

§ 88. **Value of Service.**—The shipper cannot ordinarily pay more than the service is worth, consequently, from necessity as well as from a consideration of what is just, the value of the service must constitute the maximum charge. Rates should be proportioned to the value of the service to the shipper." The value of the commodity enters into the value of the service, and consequently must also be considered in determining what constitutes a reasonable rate." That the interests of the public are important in determining the rea-

52. Delaware State Grange v. New York, etc. R. Co., 4 I. C. C. 588, 3 I. C. R. 554, 561; Loud v. South Carolina R. Co., 5 I. C. C. 529, 4 I. C. R. 205, citing cases. Loftus v. Pullman Co., 18 I. C. C. 135, 140, difference in value of service between upper and lower Pullman berths. See also Re Suspension of Western Classification No. 51, 25 I. C. C. 442, at pp. 472, 474, discussing principles of classification.

53. The principle that the value of a particular commodity must be considered in determining what is a reasonable rate thereon, is one which has been applied throughout the history of the Interstate Commerce Commission. Evans v. O. R. N. Co., 1 I. C. C. 325; Howell v. N. Y. L. E. & W. R. Co., 2 I. C. C. 272, 285, 1 I. C. R. 162; Thurber v. N. Y. C. & H. R. Co., 3 I. C. C. 473, 503, 2 I. C. R. 742; Re Excessive Rates on Food Products, 4 I. C. C.

48; Buchanan v. N. P. R. Co., 5 I. C. C. 7; Colorado F. & I. Co. v. S. P. Co., 6 I. C. C. 488, 489; Grain Shippers Asso. v. L. S. & M. S. R. Co., 9 I. C. C. 264, 286; Georgia Peach Growers Asso. v. A. C. L. R. Co., 10 I. C. C. 255, 277; Tift v. So. Ry. Co., 10 I. C. C. 548; National Machinery Co. v. P. C. C. & St. L. R. Co., 11 I. C. C. 581, 584; Society American Florists v. U. S. Express Co., 12 I. C. C. 120, 125; Re Released Rates, 13 I. C. C. 550; Union Pac. Tea Co. v. P. R. R. Co., 14 I. C. C. 545, 547; Darling v. B. & O. R. Co., 15 I. C. C. 78, 81; Union Made Garment Mfr's Asso. v. C. & N. W. Ry. Co., 16 I. C. C. 405, 407; Metropolitan Paving Brick Co. v. A. A. R. Co., 17 I. C. C. 197, 205; Forest City Freight Bureau v. A. R. Co., 18 I. C. C. 205, 206; Re Reduced Rates on Returned Shipments, 19 I. C. C. 409; Ford Co. v. M. C. R. R. Co., 19 I. C. C. 507, 509; Advances in Rates,

sonableness of charges by public service corporations, has been announced by the Supreme Court as an established principle in rate making. Mr. Justice Harlan says: "The public can not properly be subjected to unreasonable rates in order simply that stockholders may earn dividends." This view is further supported by the case of *Smyth v. Ames*,<sup>55</sup> where it was said: "It can not be admitted that a railroad corporation maintaining a highway under the authority of the state may fix its rates with a view solely to its own interests, and ignore the rights of the public. The rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered." In *San Diego Land & Town Co. v. National City*,<sup>56</sup> the Supreme Court reviewed and approved

*Western Case* 1910, 20 I. C. C. 307, 355, where Mr. Lane said: "To be sure we can never depart from the *ad valorem* principle in rate making;" Investigation of Advances in Rates on Grain, 21 I. C. C. 22, 30, 35; Investigation & Suspension Docket, 26 to 26c (Coal Rates), 22 I. C. C. 604, 623; *Minneapolis Traffic Asso. v. C. & N. W. Ry. Co.*, 23 I. C. C. 432, 437; *Bancroft-Whitney Co. v. C. N. O. & T. P. Ry. Co.*, 24 I. C. C. 557, 558; *Bernheim v. O. R. & Nav. Co.*, 25 I. C. C. 156, 158; *Union Tannery Co. v. S. Ry. Co.*, 26 I. C. C. 159, 163, where Mr. Commissioner Clements clearly and forcibly states the principle; *Dixie Dairy Men's Asso. v. Y. & M. V. R. Co.*, 27 I. C. C. 618, 621; *Scrap Iron Rates*, 28 I. C. C. 525; *Pardee Works v. C. R. R. Co.*, 29 I. C. C. 500, where value was under the facts therein, limited to the hazard; but this opinion is not in accord with the general views of the Commission

as elsewhere expressed; Reversed 39 I. C. C. 162; Rates on Flax seed 29 I. C. C. 633, 636; Molasses Rates to Knoxville 30 I. C. C. 313, 314; Railroad Com. of Montana v. B. A. & P. Ry. Co., 31 I. C. C. 641, 652; Five Per Cent. Case, 31 I. C. C. 351, 419; *Nebraska State Ry. Com. v. C. V. R. Co.*, 32 I. C. C. 41, 44; *Anson Gilkey & Hurd Co. v. S. P. Co.*, 33 I. C. C. 332, 339, 341; Des Moines Commodity Rates, 34 I. C. C. 281, 288; *Western Rate Advance Case* 1915, 35 I. C. C. 497, 606; and see Int. Com. Com. v. Chicago Great W. R. Co., 141 Fed. 1003, 1015 and cases cited; *Northwestern Pac. R. Co. v. North Dakota*, 236 U. S. 585, 59 L. Ed. 735, 35 Sup. Ct. 429.

54. *Covington & L. Turnpike Road Co. v. Sandford*, 164 U. S. 578, 596, 41 L. Ed. 560, 566, 17 Sup. Ct. 198.

55. *Smyth v. Ames*, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418.

56. *San Diego Land & Town Co.*

the case and reiterated the principle of the importance of considering "fair value \* \* \* of the services rendered."

The "value of the service" may mark the boundary beyond which rates may not ordinarily go, but the rule cannot be at all times applied. The commission has held that a difference in the value of two car loads of peaches would not justify a higher rate on the more valuable car." This is true because it is impracticable to know the exact value of the service in any case, and, as will be frequently seen throughout this chapter, rate making is not subject to unalterable theoretical rules. Judge Bethea<sup>58</sup> says of the rule: "This is considered an ideal method, when not interfered with by competition or other factors. \* \* \* This method is considered practical and is based on an idea similar to taxation." Kirkman, in *The Science of Railways*, vol. 8, pp. 42, 43, writing from the standpoint of a trained railway man, says:

"A prime factor in determining the rates carriers charge, is the value of the service to the shipper. This is the basis of remuneration for labor in every field of industry. Any other would be oppressive, if not prohibitory. Its operation involves the exercise of discrimination. But discrimination is the instinct of trade, its intelligent, directing and governing force. The ignorant, the vicious, and the superficial speak of it, when exercised by railroads, as something oppressive, something to be discountenanced. This is because they do not consider the analogies of trade, or its merits. The charges of carriers cannot be disproportionate to the thing handled. If more is charged than I can reasonably pay, it prohibits me from doing business; but if I am charged what I can afford, I am not treated unjustly, so long as the general profits of the seller are not unreasonable. It is not an act of injustice to me that a carrier charges a higher rate for my blooded horse than for my neighbor's mule, although they both occupy the same space. I cannot afford to pay the same rate for the brick used in the

v. *National City*, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804.

57. *Georgia Peachgrowers' Asso.* v. *Atlantic C. L. R. Co.*, 10 I. C. C. 255.

58. *Int. Com. Com. v. Chicago G. W. R. Co.*, 141 Fed. 1003, 1015, Noyes, Am. R. R. Rates, p. 53. *Int. Com. Com. v. Baltimore & O. R. Co.*, 43 Fed. 37, 53, 3 I. C. R. 192.

construction of my house that I can for the carpets that cover its floors. Rates are based on discriminations of this kind, at once practicable, necessary, and wise.”

This statement is correct as stating a general rule, but the rule is subject to many modifications. His illustration of the blooded horse and the mule is not a safe application of the rule. That a horse may be worth ten or twenty times as much as a mule makes the transportation service for moving the horse more valuable than for moving the mule; but when the horse is worth only a little more than the mule, it would be impossible to grade the relative rates. Difference in value on the same kind of commodity can rarely be practically applied in rate making. Value of service is more a limitation on rates than a reason for increasing rates.

Neither a high nor low value is controlling, but value should always be considered; not only because of the hazard, presently to be discussed, but because the worth of a service increases somewhat with the value of the commodity transported. While the Transportation Act 1920, Sec. 15a, gives emphasis to the cost of the service, it is yet true: “Cost of transportation may be said to determine the minimum rate that may be charged as. on the other hand, the value of the service to the shipper marks the maximum of a reasonable rate or charge.”

**§ 89. Same Subject—Use to Which Commodity Put.**—Mere difference in value or use of a different species of the same general class of commodities, furnishes no reason for divergent rates. The Commission has said:“

“It may be fairly said in conclusion that the carriers in this case show no sufficient justification whatsoever for discriminating between the three kinds of fire-clay brick involved in this proceeding. The brick themselves are so

59. Bituminous Co. in *C. F. A. Territory*, 46 I. C. C. 66, 112 and cases cited. See also *Nashville Tie Co. v. L. & N. R. Co.*, 40 I. C. C. 377, 381 and cases cited. *East Bound Trains Continental Canned Goods*, 50 I. C. C. 62, 66.

60. *Stowe-Fuller Co. v. Pennsylvania Co.*, 12 I. C. C. 215, 220; *Metropolitan Paving Brick Co. v. Ann Arbor R. Co.*, 17 I. C. C. 197.

nearly alike in color that, being the same size and of the same weight, they are practically indistinguishable the one from the other. To make different rates on each of these brick is virtually to permit the shipper to declare which of the three rates he chooses to impose upon the freight. The receiving agent of the railroad, unless an expert in fire-clay brick, could not tell which of the three rates to impose upon any one of the three varieties, except by inquiring what use was to be made of these brick. Aside from the difficulty in learning what use the brick were to be put to upon reaching their destination, we cannot regard a classification as scientific, or a difference in rates as well based, which is altogether founded upon a distinction that has no transportation significance.

"Moreover, such a differentiation, if permitted and extended throughout the various classes of freight handled by railroads, would lead to an almost endless multiplication of rates, which could find no excuse save in the use which might be made of the article transported. One class of lumber of the same measurement and of the same value and of the same general appearance and of the same weight as another might be given a distinct and separate rate. And so with building stone and cement and steel in certain forms, and many other commodities which will readily suggest themselves. Classification must be based upon a real distinction from a transportation standpoint; and we can find no such distinction between these three classes of brick, which are made of the same material and come out of the same kiln, as justifies a difference in rates. To hold otherwise would be to promote false billing on the part of the shippers, and to require the carriers, if they would avoid the penalty of the law, to make a practically impossible examination into the use to which each shipment of these brick was put."

The subject is extensively discussed in *Re Restricted Rates*,<sup>61</sup> and the conclusion stated "that the carrier has no right to

61. *Re Restricted Rates*, 20 I. C. C. 426. See also *Carter White Lead Co. v. Norfolk & W. Ry. Co.*, 21 I. C. C. 41; *Ohio Allied Milk Product Shippers v. Erie R. Co.*, 21 I. C. C. 522, 527; *Re Rates on R. R. Fuel & Other Coal*, 36 I. C. C. 1. *Association of Union Made Garments Mfrs. of America v. Chicago & N. W.*

attempt to dictate the uses to which commodities transported by it shall be put in order to enjoy a transportation rate." In the course of the opinion Conference Ruling 34 was quoted as follows:

"A tariff providing for reduced rates on coal used for steam purposes, or that the carrier will refund part of the regular tariff charges on presentation of evidence that the coal was so used, is improper and unlawful—that is to say, that the carrier has no right to attempt to dictate the uses to which commodities transported by it shall be put in order to enjoy a transportation rate."

**§ 89. Cost of Assembling Theory.**—Carriers have attempted to equalize by a system of rates the opportunities of groups of shippers, especially is this true as to manufacturers. Similarly carriers have attempted to overcome geographical disadvantages by an equalizing system of rates. Economic or geographical equalization is not the province of a carrier, nor is such equalization a factor which determines in considering the reasonableness of a particular rate or a system of rates."

**§ 90. Value of the Commodity, Its General Utility and Danger of Loss.**—The commission in the Tift and Central Yellow Pine cases," as reasons for its conclusion that the rates there under investigation were illegal and unreasonable, said, "Lumber is an inexpensive freight. \* \* \* It is not what is known as perishable traffic, \* \* \* and in case of accident, the damage is insignificant. \* \* \* Lumber is moreover an article of general utility." Each of these cases received the approval of the Supreme Court." The element of value of the commodity transported forms a proper considera-

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| R. Co., 16 I. C. C. 405; Whitcomb v. Chicago & N. W. Ry. Co., 15 I. C. C. 27; Northbound Rates on Hardwood, 32 I. C. C. 521. | v. Ill. Cent. R. Co., 10 I. C. C. 505.   |
| 62. Iron Ore Rate Cases, 41 I. C. C. 181, 188, 189.  | 64. So. Ry. Co. v. Tift, 148 Fed. 1021, 206 U. S. 428, 51 L. Ed. 1124, 27 Sup. Ct. 709; Ill. Cent. R. Co. v. Int. Com. Com., 206 U. S. 441, 51 L. Ed. 1128, 27 Sup. Ct. 700. |
| 63. Tift v. So. Ry. Co., 10 I. C. C. 548; Central Yellow Pine Asso.  |  |

tion to be taken into account in the establishment of a rate. The liability of a carrier as an insurer of freight against all loss, except such as is occasioned by the act of God or the public enemy is elementary, and the greater the value the greater the risk." In the Food Products case,<sup>65</sup> it was stated: "While rates should not be so low as to impose a burden on other traffic, they should have reasonable relation to the cost of production, and the value of the transportation service to the producer and shipper. In the carriage of the great staples which supply an enormous business, and which in market value and actual cost of transportation, are among the cheapest articles of commerce, rates yielding moderate profit are both justifiable and necessary."

"It is axiomatic that rates depend largely upon value,"<sup>66</sup> and "value has long been one of the established measures of a rate,"<sup>67</sup> but value and not use is one of the determining factors in classification.<sup>68</sup> That value should be considered in rate-making has been recognized by the Supreme Court.<sup>69</sup>

The correctness of the rule, that value should be considered in making rates, and the difficulty of applying the rule, is forcefully stated by the commission in the Overall case<sup>71</sup>

65. Notes 43 and 53 *supra*, this chapter. *Howell v. New York, L. E. & W. Ry. Co.*, 2 I. C. C. 272, 1 I. C. R. 162, 172. See also *Int. Com. Com. v. Chicago Great W. Ry. Co.*, 141 Fed. 1003, 1015, and citations.

66. *Re Alleged Excessive Rates on Food Products*, 4 I. C. C. 116, 3 I. C. R. 93, 104. See also *Mayor, etc., of Wichita v. Atchison, T. & S. F. Ry.*, 9 I. C. C. 534, 548; *Farmers', etc., Club v. A. T. & S. F. Ry. Co.*, 12 I. C. C. 351, 360.

67. *Re Reduced Rates on Returned Shipments*, 19 I. C. C. 409, 418.

68. *Fels & Co. v. Pennsylvania R. Co.*, 25 I. C. C. 154, 158, and note 53, *supra*, this chapter. *Texolite Chemical Co. v. Tex. & Pac.*

*Ry. Co.*, 40 I. C. C. 594, 596; *Nat'l Society of Record v. A. & R. R. Co.*, 40 I. C. C. 347, 355.

69. *Re Suspension of Western Classification No. 51*, 25 I. C. C. 442, 499. See also *Union Tanning Co. v. Southern Ry. Co.*, 26 I. C. C. 159, 163.

70. *Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 639, 650, 653, 57 L. Ed. 683, 33 Sup. Ct. 391, citing *Re Released Rates*, 13 I. C. C. 550; *Southern Oil Co. v. Southern Ry. Co.*, 19 I. C. C. 79; *Miller v. Southern Pac. Co.*, 20 I. C. C. 129; *Northern Pac. R. Co. v. North Dakota* 236 U. S. 585, 50 L. Ed. 735, 35 Sup. Ct. 429.

71. *Association of Union Made Garment Mfrs. of America v. Chicago & N. W. Ry. Co.*, 16 I.

where, although recognizing that equitably these cheap cotton garments were entitled to a classification different from the more valuable woolen clothing, relief was denied.

When increased value of a commodity increases the hazard, the cost of service from loss and damage may be increased and that fact might justify an increased rate.<sup>72</sup> Iron should not bear a rate equal to the average of all rates.<sup>73</sup> Coal<sup>74</sup> and salt<sup>75</sup> are articles of low grade traffic and entitled to relatively low rates.

§ 91. **Value of the Commodity—Difference between the Raw and the Manufactured Product.**—The more valuable the commodity shipped the greater the loss to the carrier should the commodity be damaged or destroyed while in course of transportation. This and the rule just discussed relating to the value of the commodity justifies the general rule that the manufactured product should take a higher rate than the raw product from which the finished product is made.

This general rule, the Commission has held, is founded in reason "because ordinarily there is a substantial difference between the value of the one and of the other, and frequently there is a greater degree of risk incident to the transportation and care of the manufactured product than of the raw material."<sup>76</sup>

While this general principle has been frequently applied,<sup>77</sup> the rule has its exceptions. Between the rates on live stock and the rates on the products of live stock there is no uniform

C. C. 405. See also *Caldwell Co. v. Chicago, I. & L. Ry. Co.*, 20 I.

C. C. 412.

72. *Kindel v. Adams Express Co.*, 13 I. C. C. 475, 485.

73. *Colorado Fuel & Iron Co. v. So. Pac. Co.*, 6 I. C. C. 488, 515.

74. *Denison Light & Power Co. v. Missouri, K. & T. Ry. Co.*, 10 I. C. C. 337; *Sligo Iron Stove Co. v. Atchison, T. & S. F. Ry. Co.*, 17 I. C. C. 139; *Sligo Iron Stove Co. v. Union Pac. R. Co.*, 19 I. C. C. 527.

75. *Anthony Salt Co. v. Mo. Pac.*

*Ry. Co.*, 5 I. C. C. 299, 4 I. C. R. 33.

76. *East St. Louis Cotton Oil Co. v. St. Louis & S. F. Ry. Co.*, 20 I. C. C. 37.

77. *Bulte Milling Co. v. Chicago & A. R. Co.*, 15 I. C. C. 351, 364; *Massee & Felton Lumber Co. v. Southern Ry. Co.*, 23 I. C. C. 110; *Association of Union Made Garment Mnfrs. of America v. Chicago & N. W. Ry. Co.*, 16 I. C. C. 405; *American Milling Co. v. Pierre Marquette R. Co.*, Unrep. Op. 328.

relation. In some territory the manufactured product takes the higher rate, in other sections live stock and packing house products take the same rates." So with grain and grain products."

§ 92. **Competition or Its Absence Considered in Determining Reasonableness of Rate.**—In the Central Yellow Pine and the Tift cases," the commission had under consideration a rate fixed by the concerted and concurrent action of the carriers and there said:

"We deem it unnecessary to express an opinion as to whether this concert of action in fixing the advanced rate amounts to an unlawful agreement under the so-called "Anti-Trust Act"—the enforcement of that act being a matter properly cognizable by the courts. It is clearly, however, within the scope of our authority and duty to consider this joint or concerted action of the defendants in the aspect of its bearing upon the reasonableness and validity of the advanced rate, the result of that action. When rates are established by concert of action and previous understanding between the carriers, it is manifest, whether or not there be a binding agreement to maintain such rates, that the element of competition is eliminated. Concert of action is wholly inconsistent with competition and, during the time the rates fixed by concert of action are maintained, the effect, so far as competition is concerned, is the same as if there was a binding agreement to maintain such rates.

78. Chicago Board of Trade v. Farmers, Merchants & Shippers C. & A. R. Co., 4 I. C. C. 158; Club v. A. T. & S. F. R. Co., 12 Squire & Co. v. M. C. R. Co., 4 I. C. C. 351; Howard Mills Co. v. M. P. Ry. Co., 12 I. C. C. 258; Investigation of Advances in Rates on Grain, 21 I. C. C. 22, 10 I. C. C. 429; Int. Com. Com. v. C. G. & W. R. Co., 141 Fed. 32; Kansas-California Flour 1003; Investigation of Alleged Rates, 29 I. C. C. 459, 32 I. C. C. 602; Wheat Rates from Oklahoma, 30 I. C. C. 93; Western Unreasonable Rates on Meat, 20 Advance Rate Case 1915, 35 I. C. C. 490, 506; Western Rate Advance Case, 1915, 35 I. C. C. 497.

79. Mayor, etc., of Wichita v. A. I. C. C. Co., 10 I. C. C. 505; Tift v. So. Ry. Co., 10 I. C. C. 548.

"Competition is favored by law. The object of the pooling section (§ 5) of the Interstate Commerce Act is to prevent 'any contract, agreement, or combination' between otherwise competing carriers by which competition between them may be done away with. In *East Tenn., Va. & Ga. Railway Co. v. Interstate Commerce Commission* it is said, the Interstate Commerce Law, it is conceded, was intended to encourage normal competition. It forbids pooling for the very purpose of allowing competition to have effect. (99 Fed. Rep. 61.) The Supreme Court holds that the suppression of competition is violative of the so-called "Anti-Trust Act" in that, such suppression restrains trade and commerce by "keeping rates and charges higher than they might otherwise be under the laws of competition." (*Joint Traffic Association Case*, 171 U. S. 505, 569, 571, 577, 43 L. Ed. 259, 287, 288, 290, 19 Sup. Ct. Rep. 25; 1 Fed. Anti-Trust Dec. 869; *U. S. v. Trans-Missouri Freight Association*, 166 U. S. 341, 41 L. Ed. 1027, 17 Sup. Ct. Rep. 540.

The ground upon which competition is favored is that it conduces to the reasonableness of rates or to the protection of the public from unreasonably high or excessive rates. In *United States v. Freight Association*, *supra*, the Supreme Court says, "competition will itself bring charges down to what may be reasonable. (166 U. S. 339, 41 L. Ed. 1027, 17 Sup. Ct. Rep. 540). The act to regulate commerce (§ 1), in prohibiting unreasonableness of rates, in effect forbids whatever conduces to such unreasonableness. In any event, it is incumbent upon the commission, when the reasonableness of rates is in issue before it, to consider how those rates were brought about—whether they are the product of untrammelled competition or the result of a concert of action or combination between the carriers establishing and maintaining them. The advanced rates complained of cannot be claimed to be the outcome of competition because the natural, direct and immediate effect of competition is to lower (*United States v. Joint-Traffic Asso.*, 171 U. S. 505, 577, 43 L. Ed. 259, 290, 19 Sup. Ct. Rep. 25), rather than advance, rates. The advanced rates must be presumed to be higher than rates which unrestrained competition would produce."<sup>81</sup>

81. *Tift v. So. Ry. Co.*, 138 Fed. Com., 206 U. S. 441, 51 L. Ed. 753; *Ill. Cent. R. Co. v. Int. Com.* 1128, 27 Sup. Ct. 700.

Mr. Commissioner Prouty, in *Re Class and Commodity Rates from St. Louis to Texas Common Points*, 11 C. C. 238, 269, 270, discusses this question as follows:

"The theory of this country in respect to interstate rates in the past has apparently been that competition between various railroads would, if it could be secured, produce reasonable freight rates in the same way that competition tends to produce a reasonable price of commodities in general. This was the idea expressed in the enactment of the 5th section of the act to regulate commerce in 1887 which prohibits pooling. It was also the purpose of the Sherman Anti-Trust Act of 1890 which forbids all agreements in restraint of interstate commerce, and as interpreted by the Supreme Court of the United States, all agreements between carriers as to the rate of freight applied to interstate shipments. The idea has received the sanction of judicial interpretation and the approval of judicial *dicta*. It is impossible to read the utterances of the Supreme Court in the *Trans-Missouri* case and the *Joint Traffic Association* case without the conviction that a majority of that tribunal were of the opinion not only that competition could be relied upon to regulate freight rates but that it was the safest and best means to that end."

§ 93. **Same Subject.**—The principle applied by the Commission has received the approval of the courts. The Supreme Court has said: "The interstate commerce law was intended to promote trade." And in *Int. Com. Com. v. Chicago G. W. R. Co.*:

"It must be remembered that railroads are the private property of their owners; that while, from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet, in no proper sense, is the public a general manager. As said in *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144, 172, 42 L. Ed. 414, 425, 18 Sup.

82. *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. 209.

83. *Int. Com. Com. v. Chicago G. W. R. Co.*, 209 U. S. 108, 119, 120, 52 L. Ed. 705, 712, 713, 28 Sup. Ct. 493.

Ct. Rep. 45, 51, quoting from the opinion in Circuit Court of Appeals—same style case, 5 Inters. Com. Rep. 697, 21 C. C. A. 59, 41 U. S. App. 466, 74 Fed. 723:

“ ‘Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law,—free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits.’

“ ‘It follows that railroad companies may contract with shippers for a single transportation or for successive transportations, subject though it may be to a change of rates in the manner provided in the interstate commerce act (*Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. Rep. 528), and also that, in fixing their own rates, they may take into account competition with other carriers, provided only that the competition is genuine, and not a pretense (*Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 36 L. Ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; *Interstate Commerce Commission v. Alabama Midland R. Co.* *supra*; *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. Rep. 209; *East Tenn., V. & G. R. Co. v. Interstate Commerce Commission*, 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. Rep. 516; *Interstate Commerce Commission v. Louisville & N. R. Co.*, 190 U. S. 273, 47 L. Ed. 1047, 23 Sup. Ct. Rep. 687).

“ ‘It must also be remembered that there is no presumption of wrong arising from a change of rate by a carrier. The presumption of honest intent and right conduct attends the action of carriers as well as it does the action of other corporations or individuals in their transactions in life. Undoubtedly, when rates are changed, the carrier making the

change must, when properly called upon, be able to give a good reason therefor; but the mere fact that a rate has been raised carries with it no presumption that it was not rightfully done. Those presumptions of good faith and integrity which have been recognized for ages as attending human action have not been overthrown by any legislation in respect to common carriers."

It is evident "that there is no presumption of wrong" when a carrier "takes into account competition with other carriers" and without an illegal combination between it and other carriers makes an advance in its rates, for as said by the court in the course of the same opinion, "Competition eliminates from the case an intent to do an unlawful act." But when an advance is made as a result of a combination that is illegal, there can be no presumption that the act of making the advance was in good faith and the carrier should not only show "a good reason therefor," but the rate so advanced is presumptively illegal, and the carrier should be required clearly to show that it is not unreasonable. Judge Speer, with that ability and clearness that usually mark his opinions, in the case of *Tift v. So. Ry. Co.*, *supra*, states the rule correctly and at length."

It is true that the commission has no authority to enforce the Sherman Anti-Trust Law and cannot penalize carriers who may violate it. but the commission can and should, when considering the difficult question of what is a reasonable rate, look to the causes that produced the rate and the method adopted in putting it into effect. Congress has been repeatedly importuned to permit interstate carriers to combine, and has so far refused to amend the Sherman Anti-Trust Law, in that respect. That the law applies to carriers, and that any contract or combination in restraint of trade between the states violates the act has been definitely settled in the *Trans-Missouri Freight and Joint Traffic Association Cases* cited *supra* section 92. It is probably true that freight associations are necessary to the proper conduct of the great business of

84. *Tift v. So. Ry. Co.*, 138 Fed. 206 U. S. 428, 51 L. Ed. 1124, 27 753, 761, 762, 763. Affirmed, So. Sup. Ct. 709.  
*Ry. Co. v. Tift*, 148 Fed. 1021,

carriers, and that there should be some modification of the law with reference to such associations. Such modifications, if made, should protect the interests of the public as well as that of the carriers, and rates made by such associations should in some manner be investigated and found reasonable before becoming effective. Of course, if a rate is reasonable, although made as the result of concert of action, it cannot, for that reason alone, be condemned by the commission."

The Transportation Act 1920 changes the principle of competition, but the foregoing discussion of the reasons why monopoly was, prior to that Act, regarded as harmful, is an appropriate statement in deciding what facts should be considered in judging whether or not particular rates are reasonable. The 1920 Amendment permits pooling under certain conditions, opens terminals to joint uses and makes the anti-trust laws inapplicable to railroads and invites consolidation of competitive lines."

§ 94. **Same Subject—Rule Since 1910.**—The Amendment of 1910, as changed in 1920, provides: "At any hearing involving a rate fare or charge increased after January 1, 1910, or of a rate fare or charge sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare or charge, or proposed increased rate, fare or charge is just and reasonable shall be upon the carrier."<sup>85</sup> The Tift case was decided before this provision was adopted, and at the time when the burden of proof was on him who attacked a particular rate. The rule applied where rates were advanced as the result of concerted action was a rule of evidence, the principal effect of which was to shift the burden of proof. Such rule in so far as that effect is concerned has now no ap-

85. *China & Japan Trading Co. v. Ga. R. Co.*, 12 I. C. C. 236, 241, and cases there cited. *Enterprise Mfg. Co. v. Ga. R. Co.*, 2 I. C. C. 451, 456; *Board of Bristol Tenn. v. Virginia & S. W. Ry. Co.*, 15 I. C. C. 453. The Commission has not always indulged any presumption against

a rate established in consequence of an agreement between carriers. *R. R. Com. of Texas v. Atchison, T. & S. F. Ry. Co.*, 20 I. C. C. 463, 466.

86. See Sec. 63a, *supra*, and chapter 9, *post*.

87. See Secs. 399 and 505, *post*.

plication, as the statute has itself placed the burden on the carrier increasing the rate. Since 1910 the Commission gives less weight to the fact of concerted action, both because of the effect of the statute and because as a practical matter carriers can advance few rates except by unanimous consent. The Transportation Act 1920 removes all necessity to consider concerted action.

§ 95. **Same Subject—Conclusion.**—The carriers are permitted to meet competition, provided that in doing so, they do not transport at a loss. Market competition frequently may require a carrier to transport goods a long distance at a comparatively low rate. So long as any profit is made by such transportation, it benefits not only the carrier but all shippers that such transportation should be accepted. But it would be unjust to the carrier to make this kind of traffic a basis for all rates. Kirkman, speaking of this kind of competition, says:"

"Competition is a potent factor in determining rates, and is general in the case of railroads. Thus the facility and cheapness with which wheat may be moved from India to Liverpool affect the rate on wheat in every quarter of the globe. They also affect the rates on substitutes therefor, such as rye, barley, and so on. In so far as this is so, it is apparent that competition is only partially dependent upon the presence of neighboring lines or other local influences. Local competition, while valuable, is not enough to enforce equitable conditions. It must be supplemented by the competitive markets of the world, including the diversified carriage of mankind by land and water. Richness of soil, facilities of production, the price of labor and rates of local carriers from points of production to places of general consumption influence the charges of other carriers in every quarter of the globe. It is no exaggeration to say that sources of competition among carriers are as numerous as the divergent interests of trade. Because of this they are self-regulative. Their errors of judgment and sins of omission and commission are self-corrective."

This quotation would not be accurate if applied to competition generally; it does correctly describe market competition. Water competition, where it exists, affects rates in a similar way to that of market competition. The carriers have suppressed water competition in some cases and use it in others to defend some particular practice. This competition is discussed by Mr. Commissioner Prouty as follows."

"Without doubt water competition is made to do most heroic service in many portions of the United States in justifying anomalies in the freight rate, but we are constrained to believe that this competition between the Atlantic and Pacific Oceans is not a thing of the imagination, but rather of intense reality with which these rail carriers must deal.

"When the rail lines first reached the Pacific Coast all merchandise was brought in by water; at the end of several years the greater portion of it still came by that means. While both the tonnage and the proportion have been largely reduced since, there has been no time when the ocean was not an important factor in determining the rate from New York to San Francisco. Nothing gives stronger evidence of the present vitality of that competition than the fact that men familiar with the situation have been to an enormous expense in providing tonnage for this service which is more than three times the amount carried in recent years. From the day the transcontinental railroad touched the Pacific Ocean its struggle has been to divert business from sail to rail and with steamships already in service and the canal in immediate prospect it is certain that this struggle has not ended.

"In 1869, when the Central Pacific and Union Pacific began business, goods used in California were mainly manufactured

89. *Business Men's League of St. Louis v. Atchison, T. & S. F. Ry. Co.*, 9 I. C. C. 318, 359, 360. Low rate induced by water competition, *Re Advances in Rates for the Transportation of Flaxseed*, 23 I. C. C. 272, 275. Water competition creating dissimilar conditions, *Georgetown Ry. & Light Co. v. Norfolk & W. R. Co.*, 2 I. C. C. 144; *Chamber of*

*Commerce of Newport News v. Southern Ry. Co.*, 23 I. C. C. 345. But a competing water route will not justify unreasonable rates, *Southern Pac. Co. v. Interstate Com. Com.*, 219 U. S. 433, 55 L. Ed. 283, 31 Sup. Ct. 288. See amendment as to water competition suppressed by rail carriers, Sec. 351, *post*.

upon the Atlantic seaboard. In order to secure the transportation of these goods the rail lines found it necessary to make a rate, not as low in cents per hundred pounds, but of as great value, all things considered, as the water rate. Most rates between New York and San Francisco have ever since been and still are established on this basis. It is idle to say that when wrought iron pipe, for instance, can be transported from coast to coast by water for 35 cents per hundred pounds, rail carriers can maintain a carload rate much above the 75 cents now in force."

There was competition in service prior to 1920, although no real competition in rates. How far competition in service will be reduced by the Transportation Act 1920 remains to be seen."

§ 96. **Rates Affected by Amount of Tonnage.**—The commission has said: "The business of the defendants (the carriers), not only in lumber, but in traffic in general, has grown and is growing largely, and in view of the fact that they deprive their franchises, or right to exist, from the public, the lumber shippers as part of the public might plausibly, to say the least, claim that they have a right to participate in the prosperity of the defendants by having their rates reduced rather than advanced. The general rule is, the greater the tonnage of an article transported, the lower should be the rate. No rule is more firmly grounded in reason or more universally recognized by carriers. It is because of the greater density of traffic north of the Ohio River in Central Freight Association territory and in the eastern territory that rates in general are made materially lower in those territories than in the southern territory." This principle was restated by Mr. Commissioner Clements, in *Farrar v. So. Ry. Co.*, 11 I. C. C. 632, 637.

In a later case Mr. Commissioner Prouty, said:"

90. *Tift v. Southern Ry. Co.*, 138 Fed. 753; *Science of Railways*, Vol. 8, pp. 10, 11; *Class and Commodity Rules*, 38 I. C. C. 411, 431.

91. *Tift v. Southern Railway Co.*, 10 I. C. C. 548, 583.

92. *Re Class and Commodity Rates from St. Louis to Texas Common Points*, 11 I. C. C. 238, 273, 274. For other cases applying the principle, see *Re Advances in Rates, Eastern Case*, 20 I. C. C. 243, 275; *National Hay*

"It is well understood that freight rates should decline as a country develops and as business therefore increases \* \* \*

"It was urged that the improvements required for these economies, the reduction of grades, the laying of heavier rail, the purchase of modern equipment, had necessitated vast outlays of money and that this was a valid reason for the advance in rates. Undoubtedly the making of these improvements has required the expenditure of large sums; in many cases it has amounted to a virtual reconstruction of the railroad and to a practical change of its equipment. This added expenditure must be considered in determining the reasonableness of these rates, but does not justify an advance in rates. What has been the purpose of these improvements? Certainly to decrease the cost of operation, to handle freight and passengers at less expense than they could be handled in the former way. It is a strange logic which imposes upon the public a higher rate while insuring to the carrier a lower cost of operation. The actual making of these improvements may have added not only to the expense of operation but may have detracted from the efficiency of operation. The prosecution of the necessary work has interfered with the movement of traffic and thereby added to the cost of this movement. But all this is temporary and comparatively insignificant and should not be made an excuse for a permanent advance in rates.

"It is urged that the increased volume of traffic has necessitated these outlays; that otherwise the business could not be handled. And that is probably true; but increase of traffic, while it may produce temporary embarrassment, should reduce, not advance, rates."

The rule stated in the Tift case *supra* is too broad. While increased density of all traffic affects rates and justifies lower rates, increased density of a particular traffic may not necessarily have that effect. If there is a large volume of a particular traffic with a light density of all traffic, higher rates may be necessary than when there is a lesser volume of the particular traffic with a greater volume of all traffic. It is however, unquestionably true that a large volume of a particular traffic is a fact which ought to be considered in determining what should be the rate thereon.

§ 97 **Same Subject.—Further Limitations of the Rule.**—The rule may not be applied too far. A traffic official of one of the defendants in the Morgan Grain case<sup>93</sup> testified that the amount of traffic offered in 1907 was so large as to pass the "economic maximum," and, therefore, the carriers not having sufficient equipment, the cost of handling the traffic was relatively higher than if less traffic had been offered. This may be true, and when true, while furnishing no reason why the carrier should increase rates based upon its inability to meet economically its obligations to the shippers, it would not be just to require the application of the rule that the greater the traffic the less relatively should be the rate. Although if the condition of more traffic than could be economically handled should be a permanent one, it would be the duty of the carrier to provide adequate facilities therefor. The effect of "this added expenditure" is discussed in the quotation *supra* from the opinion of Mr. Commissioner Prouty.

§ 98. **Density of Traffic.**—Within reasonable limits, the greater the volume of all traffic the lower should be the rates. This is obvious and is the practice of railroads generally. In the densely populated sections of the country rates are on a lower level than in the sparsely settled sections.

The statement of the Commission, speaking through Mr. Commissioner Prouty, in *Re Class and Commodity Rates, supra*, applies here. Rates should decrease as density of traffic increases,<sup>94</sup> and the fact that a region is "comparatively thinly populated"<sup>95</sup> map justify higher rates.<sup>96</sup>

and Grain Association v. Michigan C. R. Co., 19 I. C. C. 34, 47; Hydraulic Press Brick Co. v. Mobile & O. R. Co., 19 I. C. C. 530, 531; Virginia Carolina Chem. Co. v. St. Louis, I. M. & S. Ry. Co., 18 I. C. C. 1; Ozark Fruit & Grain Assn. v. St. L. & S. F. R. Co., 16 I. C. C. 134, 139; Burgess Transcontinental Freight Bureau, 13 I. C. C. 668, 675.

93. Morgan Grain Co. v. A. C. L. R. Co., 19 I. C. C. 460.

94. *Re Advances in Rates, — Eastern Case —*, 20 I. C. C. 243, 275.

95. Cherokee Lumber Co. v. Atlantic C. L. R. Co., 27 I. C. C. 438.

96. Stiritz v. New Orleans M. & C. R. Co., 22 I. C. C. 578; Memphis Freight Bureau v. Illinois Cent. R. Co., 27 I. C. C. 507, 511; Railroad Com. of Ark. v. M. & N. A. R. Co., 30 I. C. C. 488; Railway Com. of Montana v. B. A. & P. Ry. Co., 31 I. C. C. 641, 648,

§ 99. **Distance and Revenue per Ton Mile.**—Judge Cooley, then chairman of the commission, in a head note stated this rule:” “As a rule in the transportation of freight by railroads, while the aggregate charge is continually increasing the further the freight is carried, the rate per ton mile is constantly growing less all the time, making the aggregate charge less in proportion every hundred miles after the first, arising out of the character and nature of the service performed and the cost of the service; and thus staple commodities and merchandise are enabled to bear the charges of this mode of transportation from and to the most distant portions of the country.” Judge Cooley also pointed out that this rule is not only not abrogated but is sanctioned by the Act to Regulate Commerce. The general principle has been applied by the commission in other cases.” The rule is, however, subject to exceptions,” and when comparing rates, “the rate per ton mile is not always the measure of a reasonable rate, and, rightly applied, would make distance alone the gauge for transportation charges, but it is always valuable as affording a basis of comparison for relative rate burdens.”<sup>99</sup> Mr. Commissioner Prouty says, “The rate per ton mile, while often instructive, is not by any means a fair index of a reasonable rate.”<sup>101</sup> While the rate per ton mile usually decreases as distance increases, the rate per ton mile on one road is not necessarily a safe guide in fixing a rate on another road operating under different conditions.

649; *Commercial Club of Mitchell, S. Dak. v. A. & W. Ry. Co.*, 46 I. C. C. 17.

97. *Farrar v. East Tenn., Va. & Ga. Ry. Co.*, 1 I. C. C. 480, 1 I. C. R. 764.

98. *Business Men's Asso. v. Chicago, St. P. M. & O. R. Co.*, 2 I. C. C. 52, 2 I. C. R. 41; *Business Men's Asso. v. Chicago & N. W. Ry. Co.*, 2 I. C. C. 73, 2 I. C. R. 48, 52; *Gustin v. Atchison, T. & S. F. Ry. Co.*, 8 I. C. C. 277, 288. *Re Investigation of Advances in Rates on Grain*, 21

I. C. C. 22, 23; *National Hay Assn. v. Michigan C. R. Co.*, 19 I. C. C. 34, 47; *Muscogee Traffic Bureau v. Atchison, T. & S. F. Ry. Co.*, 17 I. C. C. 169, 173.

99. *Manufacturers' and Jobbers' Union v. Minneapolis & St. L. Ry. Co.*, 4 I. C. C. 79, 3 I. C. R. 115.

100. *Farrar v. So. Ry. Co.*, 11 I. C. C. 640, 649.

101. *Re Proposed Advances in Freight Rates*, 9 I. C. C. 383, 396; *Butte Milling Co. v. Chicago & A. R. Co.*, 15 I. C. C. 351, 362.

The rule that as the distance increases the rate per mile should decrease, as has been so frequently said of all formulas of rate-making, must be applied with due regard to all the circumstances and conditions surrounding the making of the rate or rates under discussion. The principle is but a rule of evidence, a fact which may justify a particular deduction, and not an inflexible rule of law. The question of expense incurred in earning the particular revenue must not be lost sight of,<sup>102</sup> and the formula is but one of many considerations in rate adjustments.<sup>103</sup>

Car mile and train mile earnings are frequently used in comparing rates and, as with the ton mile comparisons, may constitute probative evidence.<sup>104</sup>

What is sometimes called the rate per ton mile, more properly the revenue per ton mile which the rate for the distance yields, reflects the rate and the length of the haul only, and is obtained by dividing the rate per ton for the total haul by the length of the haul. Students of the principles applied to rate-judging have extended the comparisons by using revenues per gross ton mile both with and without a consideration of the empty haul incident to a particular traffic. The revenue per net ton mile gives no consideration to the ratio of revenue paying load to the total load hauled, while the revenue per gross ton mile reflects both the weight of the commodity hauled and the weight of the car in which it is hauled. Some commodities, such as oil, coal, live stock and meat products, are transported in special equipment which from necessity is hauled nearly as great distances empty as loaded. Com-

102. *Nebraska State R. Com. v. Chicago, B. & Q. R. Co.*, 23 I. C. C. 121, 125, 126. In *Kansas v. A. T. & S. F. Ry. Co.*, 27 I. C. C. 673, owing to lighter density of traffic rates for the longer distances in West Kansas were approved which yield a revenue per net ton mile higher than for the shorter distances.

103. *Ashgrove Cement Co. v. Atchison, T. & S. F. R. Co.*, 23 I. C. C. 519, 524.

104. *Wisconsin Steel Co. v. Pittsburg & L. E. R. Co.*, 27 I. C. C. 152, 162; *Lake Cargo Coal Rate Case*, 22 I. C. C. 604, 620; construed, *Rock Springs Distilling Co. v. Illinois C. R. Co.*, 27 I. C. C. 54, 57; *Milburn Wagon Co. v. Toledo, St. L. & W. R. Co.*, 27 I. C. C. 63, 66; *Re Export Rates of Flax Seed Products*, 27 I. C. C. 246, 248; *Little Rock Chamber of Commerce v. St. Louis, I. M. & S. R. Co.*, 26 I. C. C. 341, 343.

parisons which include these additional considerations are obviously more valuable than comparisons of revenue per net ton mile and revenue per car mile. In the Western Rate Advance case of 1915, those more comprehensive comparisons were presented and relied on as tending to show the propriety of selecting for rate advances the commodities affected by the tariffs there under suspension and investigation.<sup>105</sup> There are cases where the car mile comparison is the better,<sup>106</sup> and light density of traffic at the end must be considered.<sup>107</sup>

§ 99A. **Extra Line Hauls.**—Prior to the date of the passage of the Transportation Act 1920 the Commission practically without exception, save when the haul exceeded five hundred miles, applied the principle that for a two or more line haul the charges might be greater by the cost of switching than for a one line haul for a similar distance.<sup>108</sup> The principle merely raises a presumption of fact and is not a rule of law.<sup>109</sup> "Single line" comprehends all lines under the same controlling interests.<sup>110</sup>

The presumptive force of the principle lost all or substantially all of its support when Congress by the 1920 Act practically terminates whatever competition had theretofore existed among the railroads.<sup>111</sup>

105. Western Rate Advance Case, 1915, 35 I. C. C. 497.

106. Rice from Texas & Louisiana, 40 I. C. C. 285, 289; Chamber of Commerce of Johnson City v. S. Ry. Co., 46 I. C. C. 527, 531; Western Cement Rates 48 I. C. C. 201.

107. Commercial Club of Mitchell, S. Dak., v. A. & W. Ry. Co., 46 I. C. C. 1, 7.

108. Sheridan Chamber of Commerce Case, 26 I. C. C. 638, 649 and cases cited; Hayden Bros. Coal Corp. v. D. & S. L. R. R. Co., 39 I. C. C. 94, 106; Northwestern Cooperage & Lumber Co. v. M. St. P. & St. M. Ry. Co., 43 I. C. C. 629, 632.

109. Stonega Coke & Coal Co. v. L. & N. R. R. Co., 39 I. C. C. 523,

551; The Mississippi River Case, 28 I. C. C. 47, 59.

110. Capital City Oil Co. v. Y. & M. V. R. Co., 39 I. C. C. 141, 146; Wellington Mines Co. v. C. & S. Ry. Co., 39 I. C. C. 203, 205; Royster Guano Co. v. A. C. L. R. Co., 50 I. C. C. 34, 43.

111. Car Service Provision paragraphs 10 to 17, Sec. 1 of Act, sections 344A to 344H, *post*; joint use of terminal facilities, paragraph 4 of section 3 of Act, Section 347a, *post*; consolidation of carriers, paragraph 4, section 5 of Act, section 352b, *post*; anti-trust laws made inapplicable, paragraph 8, section 5 of Act, section 352g, *post*; routing further regulated, paragraphs 9 and 10, section 15 of Act, sections 401 and 402, *post*,

§ 100. **General Business Conditions.**—How far rates may be affected by the business situation of the country and the shippers has been the subject of consideration in several cases. It will be admitted that the fact, when such fact exists, that a shipper has a ready market for his goods at a good price, affects the value of the service to the shipper and may be considered in determining what, in a particular case, is a reasonable rate. It is also true that prosperous times may and generally do increase the price of both labor and equipment necessary for the carrier to operate, thus affecting "the cost of service," and consequently furnishing a fact that is an element among the many considerations entering into a determination of what is the proper rate to be charged for transportation. But the mere fact of general prosperity, or of general depression, will not justify a carrier in absorbing the one or shifting the other to the shipper. "Transportation by rail is a service of a *quasi* public nature, not to be sold to the highest bidder, nor subject to the law of supply and demand."<sup>112</sup> "The claim" that the carriers may absorb all or part of the prosperity of the shipper, says Mr. Commissioner Clements "is based upon the erroneous assumption, so prevalent among traffic managers, that a rate may be made as high as 'the traffic will bear.'"<sup>113</sup> When rates have been reduced because it was necessary to meet conditions caused by depressed financial conditions, such rates may be advanced in prosperous times to the point where they are reasonable. Mr. Commissioner Prouty, in the able discussion of the principles of rate making already quoted from, says:<sup>114</sup>

"No reduction in these rates has been made in the past for the purpose of stimulating the movement of this traffic. The amount of these advances is so slight as compared with the

providing a "fair return" on "aggregate value" paragraphs 2, 3, 5, 6, section 15a of Act, sections 405b to 405f, *post*.

112. Re proposed Advances in Freight Rates, 9 I. C. C. 382, 405. See also Freight Bureau of Cincinnati v. Cincinnati, N. O. & T. P. Ry. Co., 6 I. C. C. 195, 4 I. C. R. 592, 617.

113. Tift v. So. Ry. Co., 10 I. C. C. 548, 582; Central Yellow Pine Asso. v. Ill. Cent. R. Co., 10 I. C. C. 505.

114. Re Class and Commodity Rates from St. Louis to Texas Common Points, 11 I. C. C. 238, 272, 273.

selling price of the article transported that they produce no effect whatever upon the volume of the traffic. Now with respect to a rate of this kind we do not think an increase in the price of the article transported justifies of itself an increase in the freight rate. These rates were not reduced when the prices fell; why should they be advanced when prices rise? An incident which occurred in this very case strongly emphasizes the absurdity of the claim.

"Cotton is an important item of traffic upon the International & Great Northern Railroad, one of these respondents. It is well known that the ravages of the boll weevil have seriously affected the cotton crop in certain parts of Texas. The attorney for the International & Great Northern, himself, a former railroad commissioner of Texas and a thoughtful student of this subject, gave as a reason for the advances in question in which his line participates, that owing to the boll weevil the cotton crop upon a large part of his road was a failure, and that this reduced the amount of cotton for transportation; that in consequence of the failure of this important crop the whole country was impoverished and was able to purchase less, which also contributed to reduce the income of his railroad. For these reasons it had become necessary to advance rates in order to obtain sufficient revenue with which to operate the road and pay a fair return upon the investment. Here, therefore, we have in the same case and by parties of the same general system a claim upon the one hand that these advances are justified by general conditions of prosperity and upon the other hand that they are justified by general conditions of adversity.

"Railroads should share in the general prosperity. They should do this partly by being able to advance those rates which have declined under commercial conditions. They should do it still more by the increased traffic which they obtain. In times of prosperity when money is plentiful and business good people ride more, buy more, new industries are being established and old industries are active, traffic increases and out of such increased traffic the railway obtains, by automatic action so to speak, without any advance in its rate a large share in the general prosperity."

The opinions of Commissioners Clements and Prouty, *supra*, are in accord. The carrier may not absorb the prosperity of the shipper, but when prosperity exists the carriers may restore rates "that have declined under commercial conditions." If the prosperity of the country adds to the density of the traffic, it might, in some cases, furnish a reason for reductions in rates.

In the 1910 Western Rate Advance case, p. 315,<sup>115</sup> the broad view which the Commission may take was discussed. It was there said: "It must be borne in mind that the Commission is not a court of law, its function is to apply the mandatory and restrictive provisions of the Act to Regulate Commerce to stated conditions of fact. We must regard the problems presented to use from as many standpoints as there are public interests involved. \* \* \* The reasonableness of a rate is to be determined by no mere mathematical calculation."

And in the further course of the opinion in that case, p. 317: "It is doubtless true that in its control over the charges which our railroad may make this Commission exercises a power so extensive as to justify the broadest consideration of the economic and financial effects of its orders."

Notwithstanding the fact that business conditions should be considered in making and judging rates, it is not permissible to fix rates lower than are just and reasonable, because of the inability of a particular commodity to bear such rates. Mr. Commissioner Daniels, citing prior decisions of the Commission in deciding the claim for lesser rates based upon the statement that the prices received were less than the actual cost of production, said:<sup>116</sup> "It should be observed, however, that the reasonableness or unreasonableness of freight rates cannot be gauged solely by the ability or inability of shippers under depressed prices to market their products at the

115. Advance in Rates, — Western Case —, 20 I. C. C. 307, 315, 317.

116. Railroad Com. of Montana v. B. A. & P. Ry. Co., 31 I. C. C. 641, 644; and see N. P. R. Co. v. North Dakota, 236 U. S. 585,

59 L. Ed. 735, 35 Sup. Ct. 429; see also Lumber Rates from Helena, Ark., 41 I. C. C. 565, 577; Southeastern Lumber, 42 I. C. C. 548, 558; McLean Lumber Co. v. United States, 237 Fed. 460, 470.

existing rates with a reasonable margin of profit. Such a doctrine would lead to the conclusion that the differential burdens of production arising from natural disadvantages, distance from market, and other economical difficulties of all communities and industries should be neutralized and absorbed by the carriers which serve them."

§ 101. **Estoppel.**—Where carriers, in the exercise of their right to determine the policy under which their rates are to be made, establish a rate for the purpose of developing a particular industry, called by the carriers, "Missionary Rates," they are not estopped from advancing such rates when the resultant rates are not unreasonable, and the fact that such rates were so established is not alone sufficient evidence to justify a finding that the advanced rates are unreasonable and violative of section one of the Interstate Commerce Act. In *Western Oregon Lumber Manufacturers' Association v. Southern Pacific Co.*,<sup>117</sup> the Commission held that when the Southern Pacific Co. established a rate for the purpose of developing the lumber industry of a particular section, which rate it maintained with brief intervals for six years, an advance thereon, when "on the strength of this rate that industry had attained considerable proportions," was unreasonable. The question of the validity of this order having come before the Supreme Court, that court in speaking of the contention of the carriers said: "That is to say the contention is that the order entered by the Commission shows on its face that the body assumed not only that it had power to prevent the charging of unjust and unreasonable rates, but also to regulate and control the *general policy* (italics supplied) of the owners of railroads as to fixing rates, and consequently that there was authority to substitute for a just and reasonable rate one which in and of itself in a legal sense might be unjust and unreasonable, if the Commission was satisfied that it was a wise *policy* to do so, or because a railroad had so conducted itself as to be estopped in the future

117. *Western Oregon Lumber bound Rates on Hardwood*, 32 I. Mfrs. Assn. v. *Southern Pac. Co.*, C. C. 521, 524.  
14 I. C. C. 61. See also *North-*

from being entitled to receive a just and reasonable compensation for the service rendered.”<sup>118</sup>

While the attorneys representing the Commission before the Supreme Court disclaimed for the Commission any such construction of the order, the order was construed by the court to mean what was contended in the foregoing quotation.

In speaking of the power necessary to enter the order as it was construed, the court said: This “extraordinary power which the railroads thus say was exerted in rendering the order complained of, a power which if obtained, would open a vast field for the exercise of discretion, to the destruction of rights of private property in railroads and would in effect assert public ownership without any of the responsibilities which ownership would imply.”

The court having given the Commission’s order a construction as indicated by the contention made, held the order void.

The Commerce Court, citing the Supreme Court case, *supra*, and in speaking of orders of the Commission, said: “Its orders must be based on transportation considerations, and while it may give weight to all factors bearing either on the cost or value of the transportation service, it must disregard as well the demand of the shipper for protection from legitimate competition, domestic or foreign, for unlimited markets, or for the enforcement of equitable estoppels arising from a justifiable expectation that past rates will be maintained.”<sup>119</sup> That because a carrier has maintained a low rate upon which business has been built up, the carrier may not advance its charges to a reasonable rate, is unquestionably true. This is true because all parties know that rates are subject to legislative control and estoppel cannot apply, and Congress has not as yet given the Commission power to initiate rates but has left the general policy of rate making to the carriers, subject only to the specific provisions of the statutes regulating interstate commerce. Nor does the decision of the Supreme

118. *Southern Pac. Co. v. Interstate Com. Com.*, 219 U. S. 433, 444, 55 L. Ed. 283, 31 Sup. Ct. 288.

119. *Atchison, T. & S. F. Ry.*

*Co. v. Interstate Com. Com.*, 190 Fed. 591 (Lemon Case), Opinion Commerce Court No. 7, p. 83; same case, 203 Fed. 56. Opinion Commerce Court No. 61, p. 537.

Court necessarily mean that there is no evidentiary value in the proof that a rate was established to encourage an industry whose prosperity is dependent upon a continuation of the rate.<sup>120</sup> There is nothing in the decision of the Supreme Court which prevents the Commission from giving consideration to the presumption arising from the fact that the carriers selling transportation have long fixed a particular value thereon. This presumption is discussed in the next section.

It is also true that carriers "may not make contracts which abrogate the Act to Regulate Commerce," and such contracts cannot prevent the Commission from determining the rate involved therein and prescribing when necessary a different rate or practice.<sup>121</sup>

§ 102. **Rates Long in Existence Are Presumed to Be Reasonable.**—When conditions have not materially changed, it is consistent with the motives which usually actuate mankind to presume that a rate long in existence is reasonable and that the burden of proof is on him who seeks to obtain or justify another and higher rate. As early as 1889 the Commission, speaking of a rate sought to be changed by a carrier, said: "It has, without the pressure of competition other than on equal terms, long continued this rate and as long been making evidence that this nineteen-cent rate is not unreasonably low."<sup>122</sup> The principle was again announced in the Food Products case<sup>123</sup> and in *Proctor v. Cincinnati, H. & D. R. Co.*<sup>124</sup> Mr. Commissioner Prouty, in *Holmes v. Southern Ry.*

120. *Louisville & N. R. Co. v. Finn*, 235 U. S. 601, 59 L. Ed. 379, 35 Sup. Ct. 146; *Duluth, Minnesota Log Rates*, 29 I. C. C. 420, 421.

121. *Ottumwa Bridge Co. v. Chicago, M. & St. P. Ry. Co.*, 14 I. C. C. 121. See also *Commercial Coal Co. v. Baltimore & O. R. Co.*, 15 I. C. C. 11; *Menefee Lumber Co. v. Texas & P. Ry. Co.*, 15 I. C. C. 49; *Penn Tobacco Co. v. Old Dominion Steamship Co.*, 18 I. C. C. 197; *Baltimore Butchers Abattoir & Live Stock Co. v. Philadelphia, B. & W. R. Co.*, 20 I. C. C. 124, 128. *Daffney Brick*

*Co. v. B. & M. R. R.*, 39 I. C. C. 118, 122; *Stonega Coke & Coal Co. v. L. & N. R. Co.*, 39 I. C. C. 523, 549; *Cape Girardeau Commercial Club v. Ill. C. R. Co.*, 51 I. C. C. 105.

122. *Logan et al., Com. of Northwestern Grain Assn. v. Chicago & N. W. R. Co.*, 2 I. C. C. 604, 2 I. C. R. 431, 434.

123. *Re Alleged Excessive Freight Rates on Food Products*, 4 I. C. C. 48, 3 I. C. R. 93.

124. *Proctor v. Cincinnati, H. & D. R. Co.*, 4 I. C. C. 87, 3 I. C. R. 131.

Co.,<sup>125</sup> announced the rule in this language: "The continuance of a given rate is not conclusive evidence of the reasonableness of that rate, but when a railway company advances a rate which has been for some time in force, the fact of its continuance is in the nature of an admission against that company, which tends to show the unreasonableness of the advance; and the force of this admission becomes great in view of the general decline in the average of railway rates and the lessened cost of service." The general rule is recognized, but found not applicable to the facts in *Proctor v. Cincinnati, H. & D. R. Co.*<sup>126</sup> In the *Central Yellow Pine Asso. Case*<sup>127</sup> the Commission said: "When carriers advance a rate which has been for some time in force, the burden of proof is upon them to show sufficient grounds for such advance." In the *Tift case*<sup>128</sup> this language was used: "The maintenance of materially lower rates for such long periods of time brings this case within the rule that 'when an advance is made in rates which have long been maintained and the evidence shows that the traffic affected is large, important and constantly increasing, the advance will be held unjust unless it is satisfactorily explained.' " Each of these cases was tried in the circuit court and reached the Supreme Court where both were affirmed.<sup>129</sup> In the *Yellow Pine case* the Supreme Court said: "The question submitted to the commission \* \* \* was one which turned on matters of fact. In that question, of course, there were elements of law, but we cannot see that any one of these or any circumstances probative of the conclusion was overlooked or disregarded." It was stated by

125. *Holmes v. Southern Ry. Co.*, 8 I. C. C. 561, 568.

126. *Proctor v. Cincinnati, H. & D. R. Co.*, 9 I. C. C. 440. For further history of this case, see *Interstate Com. Com. v. Cincinnati, H. & D. R. Co.*, 146 Fed. 559; *Cincinnati, H. & D. R. Co. v. Interstate Com. Com.*, 206 U. S. 142, 51 L. Ed. 995, 27 Sup. Ct. 648, enforcing order of the Commission.

127. *Central Yellow Pine Asso. v. Ill. Cent. R. Co.*, 10 I. C. C. 505.

128. *Tift v. So. Ry. Co.*, 10 I. C. C. 548.

129. *Tift v. So. Ry. Co.*, 138 Fed. 753; *So. Ry. Co. v. Tift*, 148 Fed. 1021, 206 U. S. 428, 51 L. Ed. 1124, 27 Sup. Ct. 709; *Ill. Cent. R. Co. v. Int. Com. Com.*, 206 U. S. 441, 51 L. Ed. 1128, 27 Sup. Ct. 700.

the Supreme Court that the Tift case, *supra*, depended "upon the same legal considerations," as the Yellow Pine case.

The case of *Memphis Cotton Oil Co. v. Illinois Cent. R. Co.*, 17 I. C. C. 313, while not repudiating the doctrine above, states it less clearly than some of the prior decisions of the Commission. It is a fundamental law that acts of an individual are presumptively not contrary to his interests, and as said by Judge Wallace, in *Menacho v. Ward*, 27 Fed. 529, 532, 23 Blatch. 502: "The estimate placed by a party upon the value of his own services or property is always sufficient, against him, to establish the real value; but it has augmented probative force, and is almost conclusive against him, when he has adopted it in a long-continued and extensive course of business dealings."

Mr. Justice Brandeis<sup>130</sup> stated the proposition clearly as follows: "Low rates voluntarily established by the carrier, may be accepted by the Commission as evidence that other rates, actually or proposed, for comparable service, are unreasonably high. *Board of Trade v. Central of Ga. R. R. Co.* 28 Inters. Com. Rep. 154, 164; *Sheridan Chamber of Commerce v. Chicago B. & Q. R. Co.*, 26 Inters. Com. Rep. 638, 647. Compare *Louisville & N. R. Co. v. United States*, 238 U. S. 1, 11, *et seq.* 59 L. Ed. 1177, 1180, 35 Sup. Ct. Rep. 696. The voluntarily making of unremuneratively low rates in important traffic may also tend to induce the Commission to resist appeals of carriers for general rate increases on the ground of financial necessities."

§ 103. **Same Subject.**—The Supreme Court, in the case of *Int. Com. Com. v. Chicago G. W. Ry. Co.*,<sup>131</sup> without referring to the Tift or Yellow Pine case, said: "It must also be remembered that there is no presumption of wrong arising from a change of rate by a carrier. \* \* \* Undoubtedly when rates are changed the carrier making the change must, when properly called upon, be able to give a good reason therefor, but the mere fact that a rate has been raised carries

130. *Skinner & Eddy Corp. v. Chicago G. W. Ry. Co.*, 209 U. S. United States, — U. S. —, 63 L. 108, 119, 52 L. Ed. 705, 712, 713, Ed. —, 39 Sup. Ct. —. 28 Sup. Ct. 493, affirming same

131. *Interstate Com. Com. v. styled case*, 141 Fed. 1003.

with it no presumption that it was not rightfully done." These decisions of the Supreme Court are harmonious. The fact that a "good reason" must be given by the carrier is equivalent to saying that, "the advance will be held unjust unless it is 'satisfactorily explained,' that is, unless a 'good reason' therefor is given." Mr. Commissioner Clements<sup>132</sup> discusses these cases, and, after quoting from the decision of the Supreme Court in the Great Western case, says, "This is a mere affirmance of what the Act to Regulate Commerce itself recognizes as a right of the carriers, viz., the right to initiate rates. And it must be apparent that were a 'presumption of wrong' to attach to any change in rates which the carriers are authorized to establish, this must result in a denial of the free exercise of the right guaranteed by the Act. But it would be going far to say that the language above quoted is authority for the inference that the Supreme Court does not still recognize the principle that a rate which has been in force for a long period of years and with respect to which commercial conditions have been adjusted, which rate has presumably afforded a reasonable return to the carrier, may not be materially advanced without imposing upon the carriers the burden of justifying the increase."

The principle that the long maintenance of rates is evidence that such rates are reasonably high, was applied by the Supreme Court in a case where rates were fixed by the Railroad Commission of the state of Kentucky. Mr. Justice Pitney, delivering the opinion of the Court, said:<sup>133</sup> "Since it appeared that the company, long prior to March 25, 1910, had voluntarily established the comparatively low rates upon a substantial part of their traffic, had maintained them for many years after the reason assigned for originally introducing them had ceased to exist, and then withdrawn them, not upon the ground that they were inadequate, but because they gave rise to discrimination, and in so doing had introduced

132. *Pacific Coast Lumber Mfrs. Asso. v. N. Pac. Ry. Co.*, 14 I. C. C. 23, 38. See also *Re Class and Commodity Rates from St. Louis to Texas Common Points*, 11 I. C. C. 238.

133. *Louisville & N. R. Co. v. Finn*, 235 U. S. 601, 59 L. Ed. 379, 35 Sup. Ct. 146, 147; *Int. Com. Com. v. Louisville & N. R. Co.*, 227 U. S. 88, 99, 57 L. Ed. 431, 436, 33 Sup. Ct. 185.

rates very much greater, it seems to us that the conduct of the carrier, in the absence of some explanation more conclusive than any that was made, was sufficient basis for a reasonable inference that the special rates in force prior to March 25 upon the distillery supplies were reasonable and adequate compensation for that and other similar traffic, and that the rates thereafter charged were unreasonably high to the extent of being extortionate."

§ 104. **Voluntary Reduction of Rates.**—Where a carrier voluntarily reduces its rates, that fact under the principle applicable to presumptions would be evidence that from and after the date of the reduction the resultant rate was reasonably high. Such a presumption, however, should not be indulged to the extent of holding that the act of the carrier is proof sufficient that the rate in force prior to the reduction was unreasonably high. To hold such a presumption to be conclusive would make it dangerous for carriers ever voluntarily to reduce rates. On this subject the Commission has said: "The subsequently established lower rate is now a just and reasonable rate over the defendant lines; but the Commission is unwilling to subscribe to the theory that the voluntary reduction of a rate by a carrier conclusively shows that the former rate was unreasonable and that reparation should be granted on all shipments moving thereunder within the period of the statute of limitations."<sup>134</sup>

§ 105. **Same Subject—Act June 18, 1910.**—By Act of June 18, 1910,<sup>135</sup> it was provided: "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare or charge," the Commission may, as provided in the amendment "enter upon a hearing concerning

134. *Ottumwa Bridge Co. v. C. M. & St. P. R. Co.*, 14 I. C. C. 121, 125; *Commercial Coal Co. v. B. & O. R. Co.*, 15 I. C. C. 11; *Menefee Lumber Co. v. T. & P. Ry. Co.*, 15 I. C. C. 11; *Penn To-*

*bacco Co. v. Old Dominion Steamship Co.*, 18 I. C. C. 197; *Baltimore Butchers Abattoir v. P. B. & W. R. Co.*, 20 I. C. C. 124.

135. *Post*, Secs. 398, and 399.

the propriety of such *rate, fare, charge, classification, regulation or practice*," and "after full hearing. \* \* \* the Commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice" as it might make in an ordinary proceeding complaining of an existing rate. It is further provided that, "At any hearing involving a *rate* increased after January 1, 1910, or of a rate sought to be increased after the passage of this Act, the burden of proof to show that the increased *rate* or proposed increased *rate* is just and reasonable shall be upon the common carrier."

The Transportation Act 1920 substitutes "lawfulness" for "propriety" in the quotation above from the Act of 1910; and after the word *rate* italicized above adds "fare or charge or proposed increased rate, fare or charge." This Act changes the language, but adds nothing to the meaning of the former Act as enforced by the Commission.<sup>136</sup> "Rate, fare or charge" are used although the clear meaning of the whole section is that when any change is made in any classification, regulation or practice affecting and increasing a rate, the burden of justifying the change is upon the carrier. A change that did not increase the rate would not, as to the burden of proof, be affected by the amendment.

This statutory rule as to burden of proof does not lessen the force of the rules of evidence stated in the preceding two sections. The Commission, in speaking of a rate in force for a quarter of a century and which had been materially advanced in the last seven years, held that the reason justifying a further advance "must be even more cogent," and that the history of the rates, "was evidence which bears strongly upon the propriety of the \* \* \* increase."<sup>137</sup> In a still more recent case the rule was stated with its proper limitations as follows: "Undoubtedly a presumption of reasonableness arises from the long existence of a rate; but if this presumption were conclusive, necessary and proper changes in rates would be prohibited."<sup>138</sup>

136. Section 399, *post*.

137. United States Leather Co. v. Southern Ry. Co., 21 I. C. C. 323, 327.

138. Robinson Land & Lumber Co. v. Mobile & O. R. Co., 26 I. C. C. 427, 429. For illustrative application of the principle see,

The Commerce Court,<sup>139</sup> citing the Great Western case,<sup>140</sup> gave that case a somewhat wider meaning than was meant by the opinion therein. In reversing the Commerce Court, the Supreme Court cited the Great Western case, but said: "Under the circumstances the maintenance of these low rates, after the water competition disappeared, tends to support the theory that by an increase of business or other cause they had become reasonable and compensatory." So, the presumption may or may not arise and all the facts must be considered. The syllabus of the opinion is as follows: "The value of evidence in rate proceedings varies, and the weight to be given to it is peculiarly for the body experienced in regard to rates and familiar with the indicia of rate-making."

"When rail rates are advanced with the disappearance of water competition, no inference adverse to the railroads can be drawn, but when the old rates had been maintained for *several* years after such disappearance *there is a presumption if the* rates are raised that the advance is made for other purposes."<sup>141</sup> The italics do not appear in the syllabus.

The railroad situation is radically different since Federal control, the 1920 Amendment proposes at least two new and untried experiments, the elimination of competition and a partial guaranty of fair returns; and issues hereafter presented must be "determined, at least to a great extent, in the light of present conditions."<sup>142</sup>

**§ 106. Grouping Territory and Giving Each Group Same Rate Legal under Some Circumstances.**—It has been and is yet a practice with carriers to group contiguous territory and

Ocheltree Grain Co. v. St. Louis & S. F. R. Co., 13 I. C. C. 46; Millar v. New York C. & H. R. R. Co. 19 I. C. C. 78; Audley, Hill & Co. v. Southern Ry. Co., 20 I. C. C. 225; Commercial Club of Omaha v. Southern Pac. Co., 20 I. C. C. 631.

139. Louisville & N. R. Co. v. Interstate Com. Com., 195 Fed. 541, 557, Opinion Commerce Court No. 4, pp. 325, 375, and see same styled case, 184 Fed. 118, denying

a preliminary application for injunction.

140. Int. Com. Com. v. Chicago G. W. Ry. Co., 209 U. S. 108, 119, 52 L. Ed. 705, 712, 713, 28 Sup. Ct. 493.

141. Int. Com. Com. v. Louisville & N. R. Co., 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185. See also note 120 this chapter.

142. Green v. A. & V. Ry. Co., 43 I. C. C. 662, 674.

give the same rate to all points within a particular group. This practice is called "blanketing." The Commission in 1888, speaking of this practice, said:<sup>143</sup>

"This is a practice which prevails very largely in the making of rates and results in giving to some towns rates which are relatively lower than are charged to others. It is probably a convenient practice to the railroad companies or it would not be so often adopted; and it may sometimes tend to equalize railroad advantages as between towns without wronging any one. The system is not necessarily illegal, it only becomes illegal when it can be shown that illegal results flow from it."

The practice is not approved by the Commission, however, when "the difference in the transportation expense from the various parts of such district is considerable and substantial."<sup>144</sup>

Texas is arranged in groups for rate-making purposes, and when the parties to the case are satisfied with the system, the Commission will not disturb it.<sup>145</sup>

But in referring to the holding in the Farmers, Merchants & Shippers Club case, *supra*, the Commission said: "In so holding we said that the reasonableness of these rates must be determined not by considering the rate from the point of origin to a particular station in the group, but rather as applicable to the entire group. It is evident that every system of group rates must occasion more or less discrimination. The rate to the nearer edge of the group as compared with that to the more distant edge is of necessity discriminatory."<sup>146</sup>

143. *LaCrosse Manufacturers' & Jobbers' Union v. Chicago, M. & St. P. R. Co.*, 1 I. C. C. 629, 631, 2 I. C. R. 9, 10. See also *Business Men's Asso. of Minnesota v. Chicago, St. P., M. & O. Ry. Co.*, 2 I. C. C. 12, 52, 2 I. C. R. 41, 46; *Lippman & Co. v. Ill. Cent. R. Co.*, 2 I. C. C. 584, 2 I. C. R. 414; *Howell v. New York, L. E. & W. R. Co.*, 2 I. C. C. 272, 2 I. C. R. 162; *Imperial Coal Co. v. Pittsburg & L. E. R. Co.*, 2 I. C. C. 618, 2 I. C. R. 436.

144. *Newland v. N. Pac. R. Co.*,

6 I. C. C. 131, 4 I. C. R. 474, 480; *Merchants' Union of Spokane Falls v. N. Pac. R. Co.*, 5 I. C. C. 478, 4 I. C. R. 183; *Rea v. Mobile & O. R. Co.*, 7 I. C. C. 43.

145. *Farmers, Merchants & Shippers Club v. Atchison, T. & S. F. Ry. Co.*, 12 I. C. C. 351, 365. Although when such grouping results in unjust discrimination it will be changed. *Kaufman Commercial Club v. T. & N. O. R. Co.*, 31 I. C. C. 161.

146. *Mitchell v. Atchison, T. & S. F. Ry. Co.*, 12 I. C. C. 324, 325.

In concluding the opinion of the Commission, Mr. Commissioner Prouty said: "It is impossible to pass abruptly from the group system."

There are many cases in the reports of the Commission recognizing the group system of rates, some of which will be discussed in the chapter on Equality in Rates. In this section the reasonableness of rates is under discussion and the group system is opposed to the distance basis.

Considering distance and the group system, the Commission said: "Distance is, of course a factor to be considered in determining the reasonableness of rates, and when rates are constructed upon this basis, and other things are equal it may become a very important factor. When, however, as in this case, rates are constructed and maintained upon the group system and the subject matter is a heavy commodity like coal, and the differences in distance are relatively inconsiderable, such differences do not of themselves compel differences in rates."<sup>147</sup>

As a general rule in establishing the boundary lines of groups, some measure or principle, such as radial or operating is possible, it should be tolerated. In giving such reasons, tures of the country, and the location of transportation lines should be followed.<sup>148</sup>

**§ 107. Grouping Producing Points, and Making Zones Taking Same Rates.**—The principles discussed in the foregoing section have been applied by the Commission to cases where a more or less contiguous territory is given the same rate to the markets. In speaking of such system already in existence the Commission said:

"When the United States Government transports a package 10 miles for one citizen for 10 cents, while it charges his neighbor the same amount for transporting a like parcel 3,000 miles, a clear discrimination is made, but it is a discrimination of that character which by universal consent is in the public interest.

For a discussion and history of the Texas common point territory and a comparison with the transcontinental group, see Texas Common Point Case, 26 I. C. C. 528, 529.

147. Victor Manufacturing Co. v. Southern Ry. Co., 27 I. C. C. 661, 663.

148. Humphrey Brick & Tile Co. v. P. R. R. Co., 50 I. C. C. 457, 462.

So, here, it is by no means certain that these postage-stamp rates as applied to the distribution of the products of the Pacific coast states are not upon the whole for the general public good. Under this system the producers upon the Pacific coast are given the widest possible market for their products; the carriers obtain a certain amount of long-distance business at remunerative rates, which they would not otherwise have; the freight rate does not so far enter into the cost of these articles to the consumer that any noticeable burden is imposed upon any section of the country. If this Commission were required to establish a reasonable schedule of rates for the transportation of citrous fruits from southern California to eastern destinations, we should not feel at liberty to put in this blanket; but to establish graded rates at this time upon lemons would be to break up this rate system which is highly satisfactory to all parties concerned, and while the action of the court may in the end compel us to do this, we feel that we can for the present, properly leave this situation as it is."<sup>149</sup>

The rates resulting from this system of rate-making must, of course, be reasonable and not unjustly or unduly discriminatory.<sup>150</sup> The system has its irregularities at best, but there are reasons why, at least until a more scientific basis of rate-making is possible, it should be tolerated. In giving such reasons, the Commission has said:

"In transportation of low-grade commodities that move in bulk and in large quantities it is a long established custom to group or blanket a number of stations or a large expanse of territory. Such rate adjustments necessarily to some extent disregard distances. If strictly distance rates were applied to grain moving from points of origin it is apparent that at a certain distance from a market that is prepared to purchase the surplus the rate would be prohibitive."<sup>151</sup>

149. *Arlington Heights Fruit Exchange v. Southern Pac. Co.*, 22 I. C. C. 149, 156; order sustained by Commerce Court, *Atchison, T. & S. F. Ry. Co. v. United States*, 203 Fed. 56. Opinion Commerce Court No. 61, p. 537.

150. *Sun Company v. Indianapolis Sou. R. Co.*, 22 I. C. C. 194,

197; *Clyde Coal Co. v. Pennsylvania R. Co.*, 23 I. C. C. 135.

151. *Kansas City Transp. Bureau v. Atchison, T. & S. F. Ry. Co.*, 16 I. C. C. 195, 204. For typical grouping, see *Ferguson Saw Mill Co. v. St. Louis, I. M. & S. Ry. Co.*, 18 I. C. C. 396, 398; *Re Transportation of Wool, Hides*

In prescribing rates, the Commission has adopted a system of zones "as an appropriate solution" of a particular rate situation.<sup>152</sup> The courts recognize that the Commission has the jurisdiction to determine the effect of the custom of the carriers in making groups and zones.<sup>153</sup> It is interesting to note that in prescribing parcel post rates, the postage stamp system was abandoned to an extent and zone rates applied.

§ 108. **Basing Point System.**—What this system is and the attitude of the Commission thereon cannot be better stated than by using the language of the Commission itself. In *Board of Trade of Hampton v. Nashville, Chattanooga & St. L. R. Co.*,<sup>154</sup> it was said by Mr. Commissioner Clements:

"As stated in our finding of fact, through rates made in this way—that is, composed of rates to "basing points" and local rates back—are in pursuance of what is known as the "basing point" system of rate-making, which according to the evidence of the witness (Cutler), prevails "throughout the southern territory. This system has been heretofore several times discussed and disapproved by the Commission. *Re Louisville & N. R. Co.*, 1 I. C. C. Rep. 84, 85, 1 Inters. Com. Rep. 287; *Martin v. Chicago, B. & Q. R. Co.*, 2 I. C. C. Rep. 25, 46, 47, 2 Inters. Com. Rep. 32; *Re Tariffs and Classifications of A. & W. P. R. Co.*, 3 I. C. C. Rep. 19, 24, 25, 46-49, 2 Inters. Com. Rep. 461.

"Under this system, where the haul is through the basing point to a point beyond, the rate to the latter is the through rate to the basing point plus the local rate from the basing point on and where, as in the present case, the haul is to an intermediate point, the rate to the intermediate point is the rate for the haul through such intermediate point to the basing point plus the local rate back over the same line. In the former

and *Pelts*, 23 I. C. C. 151, 164 (coal); *Transportation Bureau of Wichita v. St. Louis, I. M. & S. Ry. Co.*, 23 I. C. C. 679, 680.

152. *Pacific Creamery Co. v. Atchison, T. & S. F. Ry. Co.*, 29 I. C. C. 405, 408, and cases cited.

153. *Int. Com. Com. v. Chicago, R. I. & P. Ry. Co.*, 218 U. S. 88, 54 L. Ed. 946, 30 Sup. Ct. 651.

154. *Board of Trade of Hampton v. Nashville, C. & St. L. R. Co.*, 8 I. C. C. 503, 520, 521, 522. See also *Board of Trade of Dawson v. Central of Ga. Ry. Co.*, 8 I. C. C. 142. Competition at one place may justify a different rate to another, *Roberts Cotton Oil Co. v. Illinois C. R. Co.*, 21 I. C. C. 248.

case, the haul is not treated as a continuous haul through the basing point to the point beyond, but as two distinct hauls; one a through haul to the basing point, and the other a local haul from the basing point to the point beyond; and in the latter case, not as a through haul to the intermediate point, but as a haul through the intermediate point to the basing point beyond plus a local haul back. Local hauls, as is well known, are much more expensive to the carrier per mile than long through hauls, or any proportion of such through hauls. Therefore local rates are properly made much higher for the same distance than through rates, and hence the charge of a local rate for a part of a through haul, when the extra expense of a local haul has not been incurred, is *prima facie*, excessive, *Augusta Southern R. Co. v. Wrightsville & T. R. Co.*, 74 Fed., Rep. 522.

"It is a significant fact, that the result of this system of rate-making is to enable the basing-point merchants to compete with the local merchants of surrounding localities at their own doors on equal terms, while the latter are debarred from such competition with the former, and as to territory intermediate between the basing points and surrounding localities merchants at the basing points are given such an advantage in rates as to enable them to undersell merchants at surrounding localities, and drive them out of the "jobbing business" in such intermediate territory as the testimony shows has been the result in the present case. The direct tendency and almost invariable outcome of the system is that basing points are built up and flourish at the expense of surrounding localities. The building up of one locality at the expense of another, by rates favoring the former and discriminating against the latter, was undoubtedly one of the principal evils which the Act to Regulate Commerce was designed to remedy, and it would seem that due allowance might and should be made for the effect of competition without defeating the object of the law."

The system of making the rate to the point beyond the full local from the basing point was abandoned by the carriers and a system of differentials or arbitraries over the basing point established. Even this, when resulting in discrimination, is illegal and the principle was announced by the Commission that "rates to the basing points should bear some reasonable

relation to the total distances involved.”<sup>155</sup> In adjusting rates under the amended fourth section of the Act, the basing point system was practically destroyed by the Commission.<sup>156</sup>

§ 109. **Same Subject—Breaking Rates.**—It has been the system adopted by the carriers in different sections of the country to make rates to a river crossing and thence to the point of destination, the through rate being a combination of the two. In some places this system, called the *rate breaking* system, is applied at inland points although “such an adjustment is unusual, because it is at points and on the banks of rivers, where a transfer is necessary, that rates ordinarily break.” And “to have rates break at a particular point is not an inherent right.”<sup>157</sup> While the system of breaking rates at particular points may not be the best, the Commission cannot at once overcome such a system but can, when necessary to prevent discrimination, control this method of rate-making. Speaking of the system in a case where the complainants insisted, “that the system of basing rates to the Missouri River cities and points beyond upon the Mississippi River crossings is improper,” Mr. Commissioner Clark, for the Commission, said: “We are not impressed with the view that the system of making rates on certain basing lines should be abolished. No system of rate-making has been suggested as a substitute for it, except one based upon the postage stamp theory, or one based strictly upon mileage. Either of these would create revolution in transportation affairs and chaos in commercial

155. *Board of Trade of Carrollton v. Central of Ga. Ry. Co.*, 28 I. C. C. 154. See also *Mayor and Council of Boston, Ga. v. Atlantic C. L. R. Co.*, 24 I. C. C. 50; *City of Montezuma v. Central of Ga. Ry. Co.*, 28 I. C. C. 280; *Town of Pelham, Ga. v. Atlantic C. L. R. Co.*, 28 I. C. C. 433; *Mayor and Council of Douglas, Ga. v. Atlantic, B. & A. R. Co.*, 28 I. C. C. 445; *Mayor and Council of Vienna, Ga. v. Georgia, S. & F. Ry. Co.*, 28 I. C. C. 173; *LaGrange Chamber of Commerce*

*v. Atlanta & W. P. R. Co.*, 28 I. C. C. 178; *Mayor and Council of Tifton, Ga. v. Louisville & N. R. Co.*, 9 I. C. C. 160; *Columbia Grocery Co. v. Louisville & N. R. Co.*, 18 I. C. C. 502.

156. *Fourth Section Violations in the Southeast*, 30 I. C. C. 153.

157. *Mr. Commissioner Harlan, in Commercial Club of Duluth v. Baltimore & O. R. Co.*, 27 I. C. C. 639, 650, 657. See also *Sioux City Terminal Elevator Co. v. Chicago, M. & St. P. Ry. Co.*, 27 I. C. C. 457, 463.

affairs, that have been builded upon the system of rate-making now in effect. It must not, however, be assumed that a basing line for rates may be established and be made an impassable barrier for through rates, or that cities or markets located at or upon such basing line have any inviolable possession of or hold upon, the right to distribute traffic in or from the territory lying beyond. Development of natural resources, increase in population, growth of manufacturing and producing facilities, and increased traffic on railroads create changed conditions which may warrant changes in rates and in rate adjustments in order to afford just and reasonable opportunity for interchange of traffic between points of production and points of large consumption."<sup>158</sup> The order of the Commission in the case in which the above announcement was made coming before the Supreme Court, this declaration was quoted by the court and, replying to the contention that the Commission had adopted illegal principles in arriving at its conclusions effective in the order, the court said: "As we have said, the Commission is the tribunal that is intrusted with the execution of the interstate commerce law, and has been given very comprehensive powers in the investigation and determination of the proportion which rates charged shall bear to the services rendered, and this power exists, whether the system of rates be old or new. If old, interests will have probably become attached to them and, it may be, will be disturbed or disordered if they be changed. Such circumstance is, of course, proper to be considered and constitutes an element in the problem of regulation, but it does not take jurisdiction away to entertain and attempt to resolve the problem. And it may be that there cannot be an accommodation of all interests in one proceeding."<sup>159</sup> The opinion of the Court refers to the force "due to the judgments of a tribunal appointed by law and informed by experience."<sup>160</sup>

158. *Burnham, Hanna, Munger Dry Goods Co. v. Chicago, R. I. & P. Ry. Co.*, 14 I. C. C. 299, 303, 312, 313.

159. *Int. Com. Com. v. Chicago, R. I. & P. Ry. Co.*, 218 U. S. 88, 107, 108, 110, 54 L. Ed. 946, 30 Sup. Ct. 651, reversing the lower

court in *Chicago, R. I. & P. Ry. Co. v. Int. Com. Com.*, 171 Fed. 680, and sustaining the Commission in *Burnham, Hanna, Munger Dry Goods Co. v. Chicago, R. I. & P. Ry. Co.*, 14 I. C. C. 299.

160. *Illinois C. R. Co. v. Int. Com. Com.*, 206 U. S. 441, 454, 51

Breaking rates at rivers grew out of the fact that many roads ran only to the river and other roads took the commodity thence, there being no physical connection between the roads. Another reason was that in some instances one of the hauls was by water and the water carrier had no physical connection with the rail carrier which performed the other part of the through haul. The carriers as a matter of preference or to enable one city to enjoy advantages similar to a more favorably located city, extended the principle.<sup>161</sup> There is now no justification for refusing through rates merely because the haul crosses the Mississippi, Ohio or some other river. The principle of charging as a through rate the aggregate of two local rates is illogical and conflicts with the evident legislative purpose to make all the roads one aggregate system.

§ 110. **Comparisons between Different Lines as a Means of Determining Correct Rates.**—It is competent to compare rates, distances and general conditions on one road with those on another when considering the adjustment of rates, but in connection therewith all other factors which enter into the question of what constitutes a reasonable rate must be considered.<sup>162</sup> Rates should be relatively as well as absolutely reasonable, and a locality not widely dissimilar from another is *prima facie* entitled to the same rate.<sup>163</sup> When the circumstances and conditions are substantially dissimilar, comparison of rates are valueless.<sup>164</sup> Comparisons of "transportation rates in force on lines of rival companies or on different branches or lines of the same company have a bearing upon and are entitled to con-

L. Ed. 1128, 27 Sup. Ct. 700, citing *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 44 L. Ed. 309, 18 Sup. Ct. 502; *East Tennessee, Va. & Ga. Ry. Co. v. Int. Com. Com.*, 181 U. S. 1, 27, 45 L. Ed. 719, 21 Sup. Ct. 516.

161. *Nashville Lumbermens Club v. L. & N. R. Co.*, 40 I. C. C. 59, 60, 61; *Live Stock from Nashville*, 48 I. C. C. 277, 281.

162. *Cannon v. Mobile & O. R. Co.*, 11 I. C. C. 527, 543; *Lincoln Creamery Co. v. Union Pac. R.*

*Co.*, 5 I. C. C. 156, 3 I. C. R. 794; *Re Tariffs of Transcontinental Lines*, 2 I. C. C. 324, 2 I. C. R. 203.

163. *Manufacturers' and Jobbers' Union v. Minneapolis & St. L. R. Co.*, 4 I. C. C. 79, 3 I. C. R. 115.

164. *Business Men's Asso. v. Chicago & N. W. R. Co.*, 2 I. C. C. 73, 2 I. C. R. 48; *Evans v. Union Pac. R. Co.*, 6 I. C. C. 520; *Marten v. Louisville & N. R. Co.*, 9 I. C. C. 581, 597, 12 I. C. C. 223

sideration in connection with the question of reasonable charges for transportation services rendered under like conditions."'<sup>165</sup> And as said by Mr. Commissioner Harlan:<sup>166</sup>

"But while the revenue per ton per mile over other routes on other lines and to other destinations is often suggestive in arriving at a proper estimate of the reasonableness of a rate over a route complained of, it is by no means conclusive. Varying conditions existing on different lines must of necessity justify differences in rates for hauls of the same distance. The real question in any such complaint is the reasonableness of the particular rate on the particular line between the points in question. In testing such a rate the rates on the same or adjacent lines in the immediate territory where the same conditions exist are of much greater significance and afford a much more accurate basis for our action."

A mere comparison of the rates attacked with rates in other parts of the country is not sufficient evidence upon which the commission may condemn a rate.

Nor does the mere fact that a lower rate is in force by a competing line "of itself establish the unreasonableness" of the rate by the line under investigation."<sup>167</sup>

As stated by the Commission: "There is no evidence that the rate charged was unreasonable, except that there was a lower rate to a nearby point via another line. This of itself has never been held sufficient to establish that the rate over a particular line is unreasonable."'<sup>168</sup> While this is true, there is some probative value in evidence showing that between the same points there is another line over which a lower rate exists, and this evidence when supported by the fact that the rate complained

165. *Morrell v. Union Pacific R. Co.*, 6 I. C. C. 121, 4 I. C. R. 469. See discussion of question in *Freight Bureau of Cincinnati v. Cincinnati N. O. & T. P. Ry. Co.*, 6 I. C. C. 195, 4 I. C. R. 592, 610, 611.

166. *Dallas Freight Bureau v. Gulf C. & S. F. Ry. Co.*, 12 I. C. C. 233, cited and followed, *Clark*

& *Co. v. Buffalo & S. Ry. Co.*, 18 I. C. C. 380.

167. *Delray Salt Co. v. Michigan Cent. R. Co.*, 18 I. C. C. 245.

168. *Snyder-Malone-Donahue Co. v. Chicago, B. & Q. R. Co.*, 18 I. C. C. 498, 499. Also see *Pankey & Holmes v. Central New England Ry. Co.*, 18 I. C. C. 578.

of yields a comparatively high rate per ton mile may justify a finding that such rate is unreasonable.<sup>169</sup>

Comparing one rate with another is but a method of arriving at the fair value of a particular service. The underlying principle applied in making such comparisons is the same as is used when the market value of property is sought to be determined by comparisons with the value of other property similarly situated, and which value is indicated by prices that have been paid therefor in the open market. The method of judging rates by comparison is one that has been applied since tribunals have considered the question of what are reasonable charges.<sup>170</sup>

**§ 111. Car Load and Less than Car Load Movements as Affecting the Rate.**—It has been hereinbefore shown that cost and value of service both enter into the question of what constitutes a reasonable rate. "The hazard involved,"<sup>171</sup> must also be considered in determining that question. It is indisputable that it costs more per hundred pounds to haul freight in less than car loads than it costs to haul the same freight in car load quantities. Among other reasons, this is true because the shipper loads and the receiver or consignee unloads car load shipments, while the carrier loads and unloads articles shipped in less than car loads. Usually a car load shipment is sealed by the consignor and unsealed by the consignee, and in the absence of the seals, showing that it has been tampered with, or that the car is in any way defective, there can be no such thing as a concealed loss chargeable to the carrier. The clerical expense of billing and the expense of delivering is much less in car load than in less than carload shipments, and the loss and damage on less than car load shipments is greater than on car load movements. The principle is recognized by the Commission. In the *Thurber case*<sup>172</sup> the Commission said; "It is a

169. *Parfrey v. Chicago, M. & St. P. Ry. Co.*, 20 I. C. C. 104.

170. *Bacon's Abridgment*, p. 243, title Carriers. 1 Com. Dig. C., citing 1 Sid. 36; *Hutchinson on Carriers* (2d Ed.) Sec. 447, 4 *Elliot on Railroads* Secs. 1560 *et seq.*

171. *Kindel v. Adams Express Co.*, 13 I. C. C. 475, 485.

172. *Thurber v. New York C. & H. R. R. Co.*, 3 I. C. C. 473, 2 I. C. R. 742, 752. See also *Harvard v. Pennsylvania Co.*, 4 I. C. C. 212, 3 I. C. R. 257; *Schultz-Hansen Co. v. Southern Pac. Co.*,

sound rule for carriers to adapt their classifications to the laws of trade. If any article moves in sufficient volume, and the demands of commerce will be better served, it is reasonable to give it a car load classification and rate. The car load is probably the only practicable unit of quantity."

While, as stated by the Commission in the *Thurber* case, *supra*, shippers usually load and unload car load freight, such is not the universal custom. Speaking of the practice, the Commission has said: "While there is every reason for holding that the shipper should load and unload freight handled as a strictly car load proposition, there seem to be many reasons why with respect to commodities handled by the package, the carrier should load and unload even though the rate applied may be the car load; and such we think has been the usual practice in the past. Our conclusion, therefore, is that no general and invariable rule can be laid down applying to all business which takes a car load rate."<sup>173</sup>

§ 112. **Establishing Car Load Rates.**—While the principle of a difference between carload and less than carload shipments is recognized by the Commission, and while to prevent discrimination, it could prescribe such a differential, that tribunal is disinclined to exercise such power. Mr. Commissioner Clements, voicing the opinion of the Commission, said:<sup>174</sup>

"The commission has held that differentiation by the carriers of carloads from less than car loads in the application of rates may be warranted under certain conditions. Here, however, we are asked to enter an affirmative order establishing a differential. What would be the effect upon all the business interests involved in this traffic should the commission take such action? No doubt its effect upon the jobbers at southeastern points would be beneficial; traffic would move into the southeast in such manner as to give the longest possible haul in car loads to the local dealers, who, securing these long haul car

18 I. C. C. 234, 237; when the carrier does unload or load it must be without discrimination, *Empire Fuel Co. v. Pennsylvania R. Co.*, 16 I. C. C. 219, 224.

173. *Wholesale Fruit & Produce Assn. v. Atchison, T. & S. F. Ry. Co.*, 14 I. C. C. 410, 419.

174. *Duncan v. Nashville, C. & St. L. Ry. Co.*, 16 I. C. C. 590, 593, 594, 595.

load rates, would be the beneficiaries. Other classes who would be affected by the change would be the small dealers and consumers, and it appears that the necessary operation of such a change would be to cut off these classes from purchasing in small quantities at Nashville and Ohio River points and compel them to deal with jobbers in their immediate vicinity, who would purchase in large enough quantities to secure the benefits of the lower rates on the long car load haul from the Ohio River to Nashville. The entire record points to the fact that a differential on this traffic would have the effect of enhancing the price of those products to the consumer. \* \* \*

"A railroad cannot be compelled, as prayed in this case, or even permitted to adopt a system of rate making which enables a large dealer to drive a smaller dealer out of the market. We must have some other motive upon which to act in a matter of this kind than that the trade of a particular community is a vested right belonging to any particular class in that community. We are not permitted so to narrow our view of all the interests involved as to look only to the interests of a particular class in the community, and this for the sole purpose of vesting in that class what they claim to be their inherent rights, more especially when the enjoyment thereof is to be at the expense of the community at large."

The Commission has, where any quantity rates were in force, distinguished the Duncan case,*supra*, and required that car load rates be established.<sup>175</sup>

§ 113. **Same Subject—Rule in Duncan Case Criticized.**—With great deference to the learned lawyer and experienced commissioner who wrote the opinion in the Duncan case, it is submitted that he failed to give due effect to the rule of cost of service. It does not necessarily follow that a higher rate on less than car loads increases the price to the consumer, and if it did, it does not necessarily follow that one man should receive for his money a greater service than another receives for the same amount of money. Carriers must ordinarily receive from the total of all commodities transported by them enough

175. Mutual Rice Trade & Development Assn. v. International & G. N. R. Co., 23 I. C. C. 219,

224. See also Taylor Dry Goods Co. v. M. P. Ry. Co., 28 I. C. C. 205.

to pay all operating expenses and a fair return on the investment. If fifty per cent of these commodities are transported in less than car load lots, it is fair to say that more than sixty per cent of the cost of all transportation is caused by this moiety and less than forty per cent by the half transported in car lots. But while the car load shipper costs the carrier but forty per cent of the transportation charge, he pays fifty per cent thereof. If the car load shipper paid only the forty per cent the maximum which he should pay and the less than car load shipper should pay his sixty per cent and more, the total transportation charges paid by the consumer would be the same that he pays when there is no differential and there would be no discrimination. The jobber is sometimes regarded as a mere parasite, but this view of his function is incorrect. He fills an important position in commerce. Without him, or some other equally effective agency, the producer and the consumer could not be got together. The Kansas wheat farmer could never market his wheat directly by dealing with the Georgia consumer. There must be one or more intermediaries who collect the product and distribute it to the consumer. He who collects the grain at the primary markets of Kansas City, St. Louis, Omaha, Chicago, and perhaps other cities, the jobber at Nashville, Atlanta and other cities and the retail dealer who sells direct to the consumer, each performs a necessary service in enabling the producer to sell and the consumer to buy. When a producer controls all, or a large part, of a commodity, he may himself perform all these intermediary services, but such services must be performed by some agency. The agencies performing this necessary service will be compelled by the laws of trade not to charge more than is reasonable for the service. It is not a question of a large dealer driving out the small dealer, but a question of those intermediaries paying for only what service they obtain from the carriers. The total transportation charges which the consumer pays are not increased, but decreased and these charges are equitably distributed. The justice of a car load and less than car load differential is shown by the general application by the carriers themselves of such differential.

In the Western Classification case,<sup>176</sup> the rule for determining when a carload rating should be established was stated as follows: "A carload rating should be established for a commodity when that commodity can be offered for shipment in carload quantities, unless public interests or other valid considerations require the contrary." In a subsequent case this rule was quoted, the Duncan and other cases cited, and it was said: "The Commission has always recognized the propriety of carload ratings. It has in many cases established carload and less than carload rates upon the same commodity, but whether a carload rating should be accorded in a particular instance, depends not only upon whether that commodity is offered for shipment in carload quantities, but also upon other considerations."<sup>177</sup> What the Commission meant is, that when commercial usage makes a carload of a particular commodity a greater quantity than is ordinarily used by the average shipper, the advantages to be obtained by the lower cost of movements in carloads must yield to the customs of trade. Somewhat more liberal was the rule applied in permitting the carriers to increase the minimum carload for grain products.<sup>178</sup> The round bale cotton case<sup>179</sup> was based upon a special situation, and in declining to fix a carload rating which would have applied only to cotton compressed to a stated density, it can not be said that the Commission has determined that in no case will it require the establishment of carload ratings.

**§ 114. Same Subject—Proper Differential Between Rates on Carload and Less Than Carload Freight.**—On this subject the Commission has stated the rule as follows: "The differential, like the rate itself, should be fixed with a view to the just interests of all parties concerned. \* \* \* In fixing upon a rate or a rate adjustment a carrier may always properly consider the cost of service, and that factor should have great influence with the commission in passing upon the

176. *Re Suspension of Western Classification* No. 51, 25 I. C. C. 442, 446.

177. *Taylor Dry Goods Co. v. M. P. Ry. Co.*, 28 I. C. C. 205, 207, 208, 209.

178. *Western Rate Advance Case* 1915, 35 I. C. C. 497.

179. *American Round Bale Press Co. v. A. T. & S. F. Ry. Co.*, 32 I. C. C. 458.

reasonableness of the carrier's action. If it actually costs these carriers less to handle this transcontinental freight in carloads than in less than carloads we ought not in the absence of a controlling reason to the contrary, to deny the carrier the right to make a difference in its tariff corresponding to the difference of expense. The defendant carriers have somewhat elaborately estimated the relative expense of carrying this freight in carloads and less than carloads. The nature of that testimony fully appears in the statement of facts, and need not be repeated. We have found that it costs transcontinental carriers approximately 50 per cent more to handle transcontinental traffic in less than car loads than in carloads. The less than carload rate in many of the instances called to our attention by the complainant exceeds the carload rate by somewhat more than 50 per cent, but on the whole we are inclined to think that, on the average, the difference between carloads and less than carloads established by the tariff of June 25, 1898, does not generally, if at all exceed the actual difference of cost in the service rendered.<sup>180</sup>

The question discussed in sections 111 to 114 are here discussed as they affect the reasonableness of rates. The issue of unlawful discrimination is discussed in section 156, *post*, where it will be seen that the Commission has changed its attitude from that adopted in the Duncan case, *supra*.

§ 115. **Carload Minima.**—It is usual for the carriers to provide that a specified weight of a commodity shall be required to constitute a carload in order to obtain a rate different from the rate on the same commodity moving in less than carloads. This minimum must be reasonable and must not exceed the capacity of the car. Where no minimum was established the Commission said:

"The absence of a legally established minimum car load weight suggests the inquiry as to the quantity upon which a shipper might claim the benefit of the car load rate in preference to the less-than-carload rate. And for the purpose of laying down a general rule we hold that when a car is demanded and loaded by the shipper and is tendered and other-

180. Business Men's League of Ry. Co., 9 I. C. C. 318, 358, 359. St. Louis v. Atchison, T. & S. F. See Sec. 156, *post*.

wise handled as a carload, and no minimum carload weight is legally provided, the carload rate, if it makes less than the l. c. l. rate, must be applied on the actual weight. It lies in the power of a carrier to protect its revenue by fixing, in the manner provided by law, minimum weights to be applicable under its published carload rates. If it fails to take this precaution we think it imposes no hardship upon it to give a shipper the benefit of the carload rate on the actual weight of the shipment tendered as a carload, whether it be more or less than an ordinary carload quantity."<sup>181</sup>

If the rate is for a carload, the greater the load the less the rate on each one hundred pounds, and the less the load the greater the rate a hundred. So "the minimum carload weight is a factor in determining the carload rate."<sup>182</sup>

§ 116. **Train Load Rates.**—The carload is a reasonable and practicable unit of quantity that may properly be adopted in determining rates. Perhaps logically the train load might also be considered, but in the actual movement of commodities the train load rarely occurs, and to adopt as a unit of quantity the train load would benefit very few shippers and would discriminate against a large number. Practicable units must be observed. So it has been said that lower rates by the hundred pounds for train loads than for carloads should not be established.<sup>183</sup> Applying the same principle, a rate on one hundred or one hundred thousand cars should not be less by the car than on one car.<sup>184</sup>

181. 1915 Western Advance Rate Case 35 I. C. C. 497, Chicago Wool Co. v. C. M. & St. P. Ry. Co., 40 I. C. C. 101; Southeastern Cotton Goods, 43 I. C. C. 530, 536; Consolidated Classification Case, 54 I. C. C. 8.

182. Sunderland Bros. Co. v. Missouri, K. & T. Ry. Co., 18 I. C. C. 425, 426.

183. Georgia Fruit Exchange v. Southern Ry. Co., 20 I. C. C. 623, 630; Kansas City Hay Dealers Assn. v. Missouri Pac. Ry. Co., 14 I. C. C. 597, 603; Western

Rate Advance Case 1915, 35 I. C. C. 497.

184. Planters Compress Co. v. Cleveland, C. C. & St. L. Ry. Co., 11 I. C. C. 382; Paine Bros. Co. v. Lehigh V. R. Co., 7 I. C. C. 218; Richards v. Atlantic Coast Line R. Co., 23 I. C. C. 239, 240.

185. Carr v. Northern Pacific R. Co., 9 I. C. C. 1, 14; Woodward Bennett Co. v. S. P. L. A. & S. F. T. Co., 29 I. C. C. 664, 665, and cases cited; wholesale theory disapproved, Diamond Lumber Co. v. M. & St. P. Ry. Co., 43 I. C. C.

§ 117. **Relation of Through Rates to the Sum of the Local Rates.**—In December, 1906, the Commission adopted and issued to all railroads the following ruling:

“Reduction of Joint Rate to Equal Sum of Locals (effective December 21, 1906). Where a joint rate is in effect by a given route, which is higher between any points than the sum of the locals between the same points, by the same or any other route, and such joint rate has been in effect thirty days or longer, such higher joint rate may, until further notice from the commission, be changed by reducing the same to the sum of such locals, but not otherwise, upon posting one day in advance a tariff of such reduced rate and mailing a copy thereof to the commission.

Many informal complaints are received in connection with regularly established through rates which are in excess of the sum of the locals between the same points. The Commission has no authority to change or fix a rate except after full hearing upon formal complaint. It is believed to be proper for the Commission to say that, if called upon to formally pass upon a case of this nature, it would be its policy to consider the through rate, which is higher than the sum of the locals between the same points as *prima facie* unreasonable, and that the burden of proof would be upon the carrier to defend such higher through rate.”

The foregoing administrative order of the commission furnishes a general rule which has been frequently enforced.<sup>186</sup>

65, 66; private Wire Contracts, 50 I. C. C. 731.

186. Laning-Harris Coal & Grain Co. v. Missouri Pac. Ry. Co., 13 I. C. C. 148, 159; Burnham, Hanna, Munger Dry Goods Co. v. Chicago, R. I. & P. Ry. Co., 14 I. C. C. 299; Kindel v. New York, N. H. & H. R. Ry. Co., 15 I. C. C. 555; Randolph Lumber Co. v. Seaboard A. L. Ry. Co., 13 I. C. C. 601; Milburn Wagon Co. v. Lake Shore & M. S. Ry. Co., 18 I. C. C. 144; Windsor Turned Goods Co. v. Chesapeake & O. Ry. Co., 18 I. C. C. 162;

Wells-Higman Co. v. Grand Rapids & I. Ry. Co., 19 I. C. C. 487; Webster Grocery Co. v. Chicago & N. W. Ry. Co., 19 I. C. C. 493; and ordinarily the through rate should be somewhat less than the combination of locals, Jubitz v. Southern Pac. Co., 27 I. C. C. 44, 45; Washington Milling Co. v. Norfolk & W. Ry. Co., 27 I. C. C. 546, 549; Appalachia Lumber Co. v. Louisville & N. R. Co., 25 I. C. C. 193, 194; Commercial Club of Mitchell S. Dak. v. A. & W. Ry. Co., 46 I. C. C. 1, 7; Herrick Refrigerator

There have been and may be reasons which make the rule inapplicable.<sup>187</sup>

Carriers may not avoid the application of the general principle by making different minima on local and through shipments.<sup>188</sup> The amended fourth section making it unlawful "to charge any greater compensation on a through rate than the aggregate of the intermediate rates subject to the provisions" of the Act to Regulate Commerce, makes statutory the prior rule frequently applied by the Commission.

"Penalty Rates," that is, inbound rates part of a through haul higher if the outbound movement is over a line different from the one enjoying the inbound haul, are unlawful.<sup>189</sup>

§ 118 **Proportional Rates.**—A proportional rate is but a part of a rate charged for the haul over a portion of the through route. In recognition of the fact that there has been paid or will be paid another or subsequent transportation charge, the proportional rate is usually lower than the local rate for the same haul. That such proportion may be less than the local over the intermediate line is but an application of the principle that usually a through rate is less than the sum of the locals. It is, therefore, obvious that there is nothing illegal of itself in a proportional rate, although such rate like all other rates must not be unreasonable and must not result in unjust discrimination or undue preference.

The Commission in defining and stating the principles applicable to proportional rates, said:

"A proportional rate is nothing more or less than a separately established rate, as that phrase is used in section 6 of the amended act, applicable to through transportation. And it has not been understood either by the Commission, or by

& Cold Storage Co. v. C. G. W. R. Co., 46 I. C. C. 421.

187. Coffeyville Vitrified Brick & Tile Co. v. St. Louis & S. F. Ry. Co., 12 I. C. C. 498, 499; White Bros. v. Atchison, T. & S. F. Ry. Co., 17 I. C. C. 288; Winona Carriage Co. v. Penn. R. Co., 18 I. C. C. 334; Southeastern Lumber, 42 I. C. C. 548, 558.

188. Lull Carriage Co. v. K. & S. Ry. Co., 19 I. C. C. 15, 16.

189. Mobile Chamber of Commerce v. M. & O. R. Co., 32 I. C. C. 272; The Tap Line Case, 23 I. C. C. 549, 650; Red River Oil Co. v. T. & P. Ry. Co., 23 I. C. C. 438, 447.

others so far as we are informed, that a separately established rate can be other than an open rate available to all. The separately established or proportional rate is simply one way of making up the through charges between two points; but while we have made no criticism and, as at present advised, see no grounds for any criticism of proportional rates applicable only to through movements from a defined territory or group of points, we have never recognized as valid and, as at present advised, see no grounds upon which we could recognize as valid a proportional rate limited to shipments that come into the proportional rate point over the lines of a particular carrier. Proportional rates limited to through movements from defined territory, or from a group of points, seem to form a proper basis for making up through charges for transportation from those points and that territory. But a proportional rate, the use of which is limited to shipments over a particular line, would appear to be a rate that discriminates against shippers over another line."<sup>190</sup>

When the proportionals are unreasonable the Commission may order, and has ordered, a reduction therein.

Proportional rates should as a rule be less than corresponding local rates,<sup>191</sup> and such rates have a value when they promote and preserve wholesome competition between producing centers.<sup>192</sup> The shipper is not interested in the divisions of rates between the carriers unless the resultant through rate is unreasonable, and proportionals do not measure local rates.<sup>193</sup>

190. *Bascom Co. v. Atchison, T. & S. F. Ry. Co.*, 17 I. C. C. 354, 356, 357. See also *Kansas City Transportation Bureau v. Atchison T. & F. Ry. Co.*, 16 I. C. C. 195, 201; *Board of Trade of Kansas City v. St. Louis & S. F. R. Co.*, 32 I. C. C. 297, 307; *Commodity Rates to Pacific Coast Terminals*, 32 I. C. C. 611, 632; *Hocking Valley R. Co. v. Lackawana Coal & Lumber Co.*, 224 Fed. 930; *Stevens Grocery Co. v. St. L. I. M. & So. Ry. Co.*, 42 I. C. C. 396, 398; *Iowa v. B. & O. R. Co.*, 46 I. C. C. 595, 599.

191. *Greater Des Moines Committee v. Chicago, R. I. & P. Ry. Co.*, 17 I. C. C. 54, 57; *Ottumwa Commercial Assn. v. Chicago, B. & Q. R. Co.*, 17 I. C. C. 413, 414.

192. *R. R. Com. of Kansas v. Atchison, T. & S. F. Ry. Co.*, 22 I. C. C. 407, 415.

193. *Indianapolis Freight Bureau v. Cleveland, C. C. St. L. Ry. Co.*, 15 I. C. C. 504, 512; *Interior Iowa Cities Case*, 28 I. C. C. 64, 73; *Serry v. Sou. Pac. Co.*, 18 I. C. C. 554, 556; *Scott Mayer Commission Co. v. Chicago, R. I. & P. Ry. Co.*, 28 I. C. C. 529, 532.

"Proportional Rates" as defined in the Panama Canal Act, retained in Transportation Act 1920, are rates "which differ from the corresponding local rates to and from the port and which apply only on traffic which has been brought to the port or is carried from the port by a common carrier."<sup>194</sup> Under this statute the Commission established port proportional rates less than the local rates, and it would seem in view of former practices of the Commission that it was the intention of Congress to require that relationship.<sup>195</sup>

§ 119. **Through Rates Must Not Exceed Aggregate of Intermediate Rates.**—This Amendment to the fourth section of the original Act provides: "It shall be unlawful for any common carrier subject to the provisions of this Act \* \* \* to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act."

It is further provided "that upon application," authority may be given "to charge less for longer than for shorter distances," and the "Commission may from time to time prescribe the extent to which such designated common carriers may be relieved from the operation of this section."<sup>196</sup>

Does the authority to grant relief apply to the whole section or only to the long and short haul clause thereof? Without the Amendment the Commission had applied as a general rule the principle that joint through rates should not exceed the sum of the locals, and<sup>197</sup> if the statute does not make universal this rule it means nothing.<sup>198</sup> It would seem that

194. Sec. 378, *post*.

195. *Baltimore & S. S. Co. v. A. C. L. R. Co.*, 49 I. C. C. 176.

196. *post*, Sec. 335.

197. Sec. 117, *supra*; *Mayfield & Grady Co. Commercial Club v. B. & O. R. Co.*, 48 I. C. C. 45, 55, 56.

198. The importance of this provision and the questions that will have to be determined thereunder, make it of interest to insert

here the House and Senate provisions, that comparison may be had between the Section as passed and the provision in the Senate and House bills. Senate Bill: "That section four of the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, be amended by striking out the words 'under substantially similar circumstances

Congress had in mind, when the Senate and House bills were combined and both changed, that relief could be granted

and conditions,' where the same appear in said section four, and further amend said section four of said Act by striking out all of said section four, beginning with the words 'Provided, however,' and further amend said section four so that when amended it will read as follows: 'Sec. 4. That it shall be unlawful for any common carrier subject to the provision of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the local rates; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance:

"'Provided, however, That the Interstate Commerce Commission may, from its knowledge, or from information, or upon application, ascertain that the circumstances and conditions of the longer haul are dissimilar to the circumstances and conditions of the shorter haul, whether they result from competition by water or rail; then it may authorize a common carrier to charge less for the longer than for the shorter distance for the transportation of passengers or property; but in no event shall the

authority be granted unless the commission is satisfied that all the rates involved are just and reasonable and not unjustly discriminatory nor unduly preferential or prejudicial.

"'That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the commission, in accordance with the provisions of this section, until a determination of such application by the commission;

"'Provided that such determination is made within one year after the passage of this Act; Provided, further, That if more than one year, in the opinion of the Interstate Commerce Commission is needed to consider the questions and make such determination of them, the Interstate Commerce Commission may extend the time beyond one year; Provided, further, That when application is made to the said commission by a carrier to fix a lower rate for longer than for shorter distances on account of water competition, said application shall not be granted if the commission, after investigation, shall find that the lower rate asked for will destroy water competition.'"

House Bill: "Sec. 8. That section four of said Act to regulate commerce be amended so as to read as follows:

only from the long and short haul clause, which clause as theretofore construed meant practically nothing, and that the

"Sec. 4. That it shall be unlawful for any common carrier subject to the provision of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the local rates; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance;

"Provided, however, that upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; Provided, further, That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the commission, in accordance with the

provision of this section, until a determination of such application by the commission."

The Committee of the House, in reporting the original bill, said: "Section 6b proposes an amendment to section 4 of the interstate commerce act in relation to charges for long and short hauls. The existing law provides that the carrier shall not charge greater compensation 'under substantially similar circumstances and conditions' for a shorter than for a longer distance over the same line in the same direction, but authorizes the commission in special cases to relieve the carrier from the operation of this provision. The courts have so construed the meaning of the words 'under substantially similar circumstances and conditions' as to practically deprive section 4 of the existing law of real vitality. In the substitute recommended by your committee, section 4 of the existing law is amended so as to leave out the words 'under substantially similar circumstances and conditions' and to prohibit a carrier from receiving greater compensation for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, or to receive a greater compensation as a through route than the aggregate of the local rates, but authorizing the Interstate Commerce Commission to relieve a carrier upon application from the operation of this section; and in order not to unduly disturb existing conditions

words authorizing relief "from the operation of this section" meant that "section" was limited by the words "be authorized \* \* \* to charge less for longer than for shorter distances."<sup>199</sup> The Transportation Act 1920 supports this view because in specifying the principles under which relief may be granted, only principles applicable to the long-and-short haul clause are named. However this may be, the Commission has applied the principle that through rates must not exceed the sum of the locals although implying that there might be conditions justifying a departure from the general rule.<sup>200</sup> Local rates that are not "subject to the provisions of" the Act to Regulate Commerce are not necessarily a proper measure of the through rate. The Commission does, and properly should, give consideration to rates fixed by State Commissions but, were it bound by such rates the exclusive power of Congress over interstate commerce would be made subordinate to the action of the states.<sup>201</sup> In discussing this question the Commission has said:

"While state rates are valuable for comparative purposes in fixing a reasonable charge for a transportation service, the assumption of complainant that the action of the defendant in this case in maintaining higher transportation rates on interstate than intrastate traffic amounts to unlawful discrimination on the part of the carrier is not sound, for upon the record

in an abrupt manner the amendment further provides that no rates or charges lawfully existing at the time of the passage of the proposed act shall be required to be changed by reason of this section prior to the expiration of six months after passage of the act, nor until any application made with the commission shall have been determined."

199. The English Railway and Traffic Act of 1888, section 27, gave the Commissioners power to direct that no greater charge should be made for a shorter than a longer haul when the circumstances demanded such direction.

Halsbury's Laws of England, vol. 4, p. 81.

200. *Arabol Mfg. Co. v. South Brooklyn Ry. Co.*, 25 I. C. C. 429, 430; *Commercial Club of Duluth v. Baltimore & O. R. Co.*, 27 I. C. C. 639, 660.

201. *Cobb v. Northern Pac. Ry. Co.*, 20 I. C. C. 100, 102; *Pulp & Paper Mfrs. Traffic Assn. v. Chicago, M. & St. P. Ry. Co.* 27 I. C. C. 83, 96; *Corp. Com. of Okla. v. A. T. & S. F. Ry. Co.*, 31 I. C. C. 532. *Rates on Beer and Other Malt Products*, 31 I. C. C. 544; *Rates on Live Poultry in Western Trunk Line Territory*, 32 I. C. C. 380.

it is shown that the condition is one over which the carrier has no control.”<sup>202</sup>

§ 120. **Through Routes and Joint Rates.**—If only the rates on the lines of each carrier considered separately were subject to the regulation of the Commission, it would be very difficult to obtain reasonable rates on those commodities which move over two or more lines. For this reason, carriers subject to the Act are required to establish through routes and joint rates. Joint rates must be reasonable and the principles relating to rates generally apply as well to these rates. Of the right of shippers to through routes and joint rates Mr. Commissioner Clements says:<sup>203</sup>

“The law does not require the commission in all cases where no through routes and joint rates exist to establish them, but only empowers it to do so in proper cases with the manifest intent of giving effect to the general purposes of the act to regulate commerce by securing reasonable facilities to the public and preventing unreasonable and unjust rates, practices, and discriminations, and in the exercise of this authority the commission is bound by the same considerations of justice and fairness as it is in the exercise of the rate-making power in other respects. Where neither the interest of the public, nor the ends of justice as between parties directly interested, will be promoted by the establishment of through routes and joint rates and divisions thereof, a proper case for the exercise of the authority invoked has not been shown.”

In discussing an order for a through route made by the Commission prior to the amendments of 1910 and 1912, the Supreme Court construing the statute said:

“We are of the opinion that the Commission had no power to make the order, if a reasonable and satisfactory through route already existed, and that the existence of such a route may be inquired into by the courts.”<sup>204</sup>

202. *Baxter & Co. v. Georgia, S. & F. Ry. Co.*, 21 I. C. C. 647, 648.

203. *Loup Creek Colliery Co. v. Virginia Ry. Co.*, 12 I. C. C. 471, 477.

204. *Int. Com. Com. v. Northern Pac. Ry. Co.*, 216 U. S. 538, 544,

54 L. Ed. 608, 30 Sup. Ct. 417, affirming Circuit Court, Northern Pac. Ry. Co. v. Int. Com. Com. and setting aside the order of the Commission in *Re Matter of Through Passenger Routes via Portland Oregon*, 16 I. C. C. 300.

§ 121. **Same Subject—Amendments of 1910 and 1912.**—Section one of the Act to Regulate Commerce, as amended by the Acts of 1906, and of 1920 makes it the duty of carriers “to establish through routes and just and reasonable rates, fares and charges applicable thereto.”<sup>205</sup>

The Amendment of August 24, 1912, known as the Panama Canal Act, provided that, “When property may be or is transported from point to point in the United States by rail or water through the Panama Canal or otherwise \* \* \* in addition to the jurisdiction given by the Act to Regulate Commerce” other jurisdiction is given.”<sup>206</sup> In the specified additional jurisdiction this is stated: “To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.”<sup>207</sup>

The Act of 1910, amended by Transportation Act 1920, gave the Commission power “after hearing” to “establish through routes, joint classifications, and joint rates, fares or charges” or “the minima or maxima or minima and maxima to be charged,” and to “prescribe the division of such rates, fares and charges,” and to prescribe the “terms and conditions under which such through routes shall be operated;” and the provision was made to apply “when one of the connecting carriers is a water line.”<sup>208</sup> There was by Act 1910. retained in 1920 Act, a limitation on the power by the provision that “In establishing any such through route the Commission shall not (except as provided in Section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad, and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established.”<sup>209</sup>

205. Sec. 335, *post*.

206. Sec. 375, *post*.

207. Sec. 377, *post*.

208. Sec. 400, *post*.

209. Sec. 401, *post*. Downie  
Pole Co. v. N. P. Ry. Co., 31 I. C.

The Act of 1906, limiting the Commission's power by this language, "provided no reasonable or satisfactory through route exists," was not reenacted in section 15 of the Act of 1910. This change in the statute makes inapplicable to the present law the decision of the Supreme Court in *Interstate Commerce Commission v. Northern Pacific Railway, supra*. The law as now written provides for a hearing with or without a formal complaint and invests in the Commission a discretion as to when and under what conditions through routes and joint rates may be established; the limitation quoted above, of course, controlling this discretionary power. Other than the quoted limitation the Commission now has like power over through routes and joint rates as over any other kind of a rate.<sup>210</sup> In exercising this discretion the Commission may permit one carrier to demand "financial security before entering into either joint rate arrangements or accepting freight under proportional rates."<sup>211</sup>

The Commission has construed the words "or otherwise" quoted from the Panama Canal Act, *infra*, and has held that it could thereunder establish through routes with a water carrier.<sup>212</sup> The Commission in the case where such holding was first made said:

"If the above amendment applies to the traffic in question, the right of the Commission to establish this through route is clear. The defendants contend that it does not apply, for the reason that this amendment relates only to the traffic which passes through the Panama Canal. They argue that the words 'or otherwise' modify the phrase 'by rail and water' and not the phrase 'through the Panama Canal.' But the plain everyday reading of the act is 'through the Panama Canal or other-

C. 142; *Lumber Rates from North Pacific Coast*, 30 I. C. C. 111; *Wheeler Lumber, Bridge & Supply Co. v. A. T. & S. F. Ry. Co.*, 30 I. C. C. 343; *Cement Rates from Mason City*, 30 I. C. C. 426; *New York Dock Ry. v. B. & O. R. Co.*, 32 I. C. C. 568; *St. L. I. M. & S. Ry. Co. v. U. S.* 217 Fed. 80. *Ogden Gateway Case*, 35 I. C. C. 131.

210. *Truckers Transfer Co. v. Charleston & W. C. Ry. Co.*, 27 I. C. C. 275, 277; *Crane Iron Works v. United States*, Opinion Commerce Court No. 55, pp. 453, 464, 209 Fed. 238.

211. *Truckers Transfer Co. v. Charleston & W. C. Ry. Co.*, 27 I. C. C. 275, 279.

212. *Augusta & Savannah Steamboat Co. v. Ocean Steamship Co.*,

wise,' and the defendants has referred us to no canon of construction nor to any reason for disregarding the obvious meaning of those words. Indeed, a consideration of the situation to which the amendment applies would seem to conclusively demonstrate that the position of the defendants is not correct, since the words 'or otherwise' are pure surplusage if read as the defendants say they should be. Traffic through the Panama Canal can only move by rail and water, unless it moves from port to port, and in that case we have no jurisdiction. We hold, therefore, that the Commission has jurisdiction to establish the through routes and the joint rates prayed for."

**§ 122. Rates on Commodities Requiring Refrigeration.—**

The charge made by a carrier for refrigeration must, like all of its other charges, be reasonable. To determine what is reasonable the general principle applied to other rates must be considered as well as the special circumstances peculiar to the shipment. On this subject the Commission has held:<sup>213</sup>

"In determining what is a reasonable charge for furnishing refrigeration for the movement of citrus fruits from California to eastern markets, nothing should be added by reason of the fact that a refrigerator car is used, since that has been taken into account in establishing the rate of transportation, nor for the service of inspection, which is substantially the same for all shipments; but the expense of transporting the additional weight of the ice and for repairs to the ice bunkers should be considered."

In the same case it was held that when the shipper pre-cooled his fruit, such fact must be considered in determining the rate.<sup>214</sup>

26 I. C. C. 380, 384, 385; Decatur Navigation Co. v. L. & N. R. Co., 31 I. C. C. 281; Pacific Nav. Co. v. S. P. Co., 31 I. C. C. 472; Federal Sugar Refining Co. v. C. of N. J. R. Co., 35 I. C. C. 488; Ocean Rail Rates to Charlotte, N. C., 38 I. C. C. 405, 410; Baltimore & Carolina S. S. Co. v. A. C. L. R. Co., 49 I. C. C. 176.

213. Arlington Heights Freight Exchange v. Southern Pac. Co., 20 I. C. C. 106; same styled case, 22 I. C. C. 149; at p. 156 see discussion of "postage stamp rates."

214. The order of the Commission was sustained by the Commerce Court, Atchison, T. & S. F. Ry. Co. v. United States, 204 Fed. 647, Opinion Commerce Court No.

§ 123. **Rates on Returned Shipments.**—What the privilege of returning shipments at less than usual rates means and the origin and growth thereof are stated by the Commission:

“The returned-shipment privilege seems to have originated for the purpose of assisting the agricultural interests. Farm implements and machinery often prove defective or break down while in use, and if full tariff rates must be paid for their transportation to a point where repairs can be effected the farmer is subjected to a serious handicap. Rules were therefore adopted permitting the return of agricultural implements, vehicles, and similar articles at one-half the regular rates.

“Through the operation of competitive forces the return-shipment rules became increasingly liberal and were gradually enlarged to cover the return of freight of every character and for every purpose. \* \* \* The record shows that while returned shipments form but a small proportion of the carriers’ entire traffic the privilege is of importance to several branches of industry.”

After thus describing the rule and after discussing the question involved therein, the Commission condemned the privilege as having no legal or logical basis.”

In the same opinion, at page 418, it was shown that when the returned shipment was on “freight in an obviously deteriorated condition,” the axiom “that rates depend largely upon value” should be considered, not because it was a returned shipment but because of the value. The difficulty of always considering value in this connection is manifest and was pointed out by Mr. Commissioner Clements as follows:

“We are not prepared to lay down the principle that old or secondhand articles must be treated differently from new or that value is the controlling element in making rates. Such of these articles or parts as are in fact scrap are entitled to

41, p. 627. For other applications of the rule see *Ozark Fruit Growers Assn. v. St. Louis & S. F. Ry. Co.*, 16 I. C. C. 106; *Asparagus Growers’ Assn. v. A. C. L. R. Co.*, 17 I. C. C. 423; *Georgia Fruit Exchange v. Southern Ry. Co.*, 20

I. C. C. 623; *Albree v. Boston & M. R. Co.*, 22 I. C. C. 303.

215. *Re Reduced Rates on Returned Shipments*, 19 I. C. C. 409, 414, and discussion and cases cited at pp. 416, 417.

the scrap rate, but if they have any value as the articles which they originally purported to be, we do not feel that we can require the carriers to transport them at other than the regular tariff rates applicable to the new or originally transported article."<sup>216</sup>

§ 124. **The Public Interest Must Be Considered in Making Rates.**—A rate made by a carrier, a legislative or an administrative body must not disregard the interests of the public, and the fact that a particular rate is necessary to enable the carrier to pay interest and dividends will not justify a rate which is unduly burdensome on the public.

The legislature of Kentucky having prescribed the maximum rate to be charged by turnpike roads in that state, the Supreme Court in determining whether or not such act was illegal, said:<sup>217</sup>

"It is proper to say that if the answer had not alleged, in substance, that the tolls prescribed by the act of 1890 were wholly inadequate for keeping the road in proper repair and for earning dividends, we could not say that the act was unconstitutional merely because the company (as was alleged and as the demurrer admitted) could not earn more than 4 per cent on its capital stock. It cannot be said that a corporation operating a public highway is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable

216. *Minneapolis Traffic Assn. v. Chicago & N. W. Ry. Co.*, 23 I. C. C. 432, 437.

217. *Covington & L. Turnpike road Co. v. Sandford*, 164 U. S. 578, 596, 597, 41 L. Ed. 560, 566, 567, 17 Sup. Ct. 198. Quoted and followed, *Smyth v. Ames*, 169 U. S. 466, 545, 42 L. Ed. 819, 848, 18 Sup. Ct. 418. See also *Minneapolis*

*& St. L. R. Co. v. Minnesota*, 186 U. S. 257, 268, 46 L. Ed. 1151, 1158, 22 Sup. Ct. 900; *Loftus v. Pullman Co.*, 18 I. C. C. 135, 140; "Having in mind the public interest;" *R. R. Com. of Texas v. Atchison, T. & S. F. Ry. Co.*, 20 I. C. C. 463, 484; *R. R. Com. of Kansas v. Atchison, T. & S. F. Ry. Co.*, 22 I. C. C. 407,

and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use its property. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The legislature has the authority in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the constitution does not require to be remedied by imposing unjust burdens upon the public."

A particular service falling within the absolute duties of the carrier may be required of a public carrier, when it is necessary to the public convenience, where the whole service performed yields a fair compensation, even though such particular service must be furnished at a loss to the carrier."<sup>410</sup>

**§ 125. General Principles Applicable to the Question, What Is a Reasonable Rate?**—It was a maxim of traffic managers that "all the traffic could bear" was the only definite principle applicable to rate making. Kirkman, in the *Science of Railways*, vol. 8, at p. 11, says: "In the practical operation of railroads such rates are made as the traffic will bear." If this rule were adopted there would be little difficulty in fixing rates. But it is apparent that such a rule, in view of the fact that the business of transportation companies is affected with

410. As to what is a "fair return" See *post*, Sec. 131. *Supra*, Sec. 83.

218. *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 51 L.

Ed. 933, 27 Sup. Ct. 585. See in this connection Sec. 100, *supra*; *National Implement & Vehicle Assn. v. B. & O. R. Co.*, 42 I. C. C. 461, 468.

a public use, would be unfair. Mr. Commissioner Clements, in *Tift v. So. Ry. Co.*, 10 I. C. C. 548, 582, says: "This claim

\* \* \* on the part of the carriers is based upon the erroneous assumption, so prevalent among traffic managers, that a rate may be as high as 'the traffic will bear.' " What "the traffic will bear" is, by force of economic law, the maximum. It has been seen that a particular service may, under some circumstances, be required of a common carrier at less than cost, but ordinarily cost of service fixes the minimum rate. It is interesting and instructive to group what has been said by the courts and the Commission with reference to this problem. The Supreme Court, speaking of the basis of a whole schedule of rates, said:

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." "

In the same case the court said:

"In passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the commission or the courts, is empowered to fully consider all the

circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment.' "

In a later case *Covington & L. Turnpike Co. v. Sandford*, 164 U. S. 578, 596, 597, 41 L. Ed. 560, 566, 567, 17 Sup. Ct. 198 section 124 *supra*, it was held, that "the rights of the public are not to be ignored."

The Supreme Court in the Minnesota Rate cases," speaking of how to determine the "fair value" upon which a fair return was legally required, said: "The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."

There is, however, a flexible limit of judgment which belongs to the power to fix rates," and, as to rates within the Interstate Commerce Acts, "the Commission is the tribunal that is intrusted with execution" of such laws."

§ 126. **Same Subject—Some Statements of the Commission as to Such General Principles.**—The Commission in *Delaware State Grange v. New York, P. & N. R. Co.*, 4 I. C. C. 588, 3 I. C. R. 554, 560, 561, in speaking of the general principles to be considered in rate making, said:

"The mandate of the statute is that all rates must be reasonable and just, but how the reasonableness and justice of a rate are to be determined is not prescribed by the statute, nor has any satisfactory test been evolved by transportation experts. Conflicts about rates arise from the conflicting interests of carriers and shippers. As carriers make their own

220. *Simpson v. Shepard*, 230 U. S. 1, 26, 51 L. Ed. 933, 27 Sup. U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 585.

222. *Int. Com. Com. v. Chicago*.

221. *Atlantic C. L. R. Co. v. R. I. & P. Ry. Co.*, 218 U. S. 88, North Carolina Corp. Com., 206 108, 54 L. Ed. 946, 30 Sup. Ct. 585.

rates, they have primary regard for their own interests, and often give less weight than they ought to the interests of those they serve. This is more frequently the case in the absence of competition. Under stress of competition, or sometimes for the purpose of developing business, rates that are equitable or even very low are likely to be made. But when a controversy arises between the public and a carrier, the question of the reasonable limit of a rate usually involves many considerations, and is often difficult to determine. A rate that might be regarded as reasonable and just by a producer and shipper, might, from a carrier's standpoint, be deemed extremely unreasonable and unjust, and, so, conversely, a rate that a carrier might claim to be reasonable in itself, and that it might support with strong reasons based upon the cost of the service, the quantity of the business and the characteristics of its line of road, might exhaust the greater part of the proceeds of the producer's commodity and be destructive to his interests. It is only stating a truism, therefore, to say there is no recognized test of a rate mutually reasonable for a carrier and for the producer of the traffic.

"The reasonableness of a rate must consequently be ascertained in every instance in which the question arises, by its relations both to the carrier and to the shipper, and by comparison with rates normally charged for like or similar service."

In *Thompson Lumber Co. v. Illinois C. R. Co.*, 13 I. C. C. 657, 664, the Commission says:

"In determining what is a reasonable and just rate many considerations are involved. Among these are the general financial and physical condition of the road, the character of the commodity in question, whether it constitutes a large or small part of the business of the carrier, whether it is economical or expensive to handle, how it compares with other commodities hauled, and, as evidencing the railroad's own judgment, whether a different rate has been in effect on this commodity at some other time."

Cost and value of service are discussed by the Commission in *Boston Chamber of Commerce v. Lake Shore & M. S. R. Co.*, 1 I. C. C. 436, 1 I. C. R. 754, 760, 761, as follows:

"The element of cost of service which may at one period have been recognized as controlling in fixing rates has long ceased to be regarded as the sole or most important factor for that purpose. The value of the service with respect to the articles carried, the volume of business, and the conditions and force of competition are justly considered to have controlling weight in determining the charges for transportation. But even with regard to the cost of service the cost is at least somewhat greater to Boston than to New York."

Import tariff duties should not be counted as part of a transportation charge.<sup>223</sup>

"A railroad company may be operated with a less return than it ought to enjoy or even at a loss, but neither condition of affairs would justify the exaction by it of rates that are higher than they reasonably should be for services performed, all things being considered."<sup>224</sup>

The problem is difficult, the facts to be considered multitudinous and of an infinite variety of modifying conditions, from which the Commission, without applying any policy which runs counter to the power granted and the duty imposed upon it, seeks by "slow evolution" to develop a satisfactory system of rates.<sup>225</sup>

In the Eastern Advance Rate case<sup>226</sup> the Commission said:

"This Commission is called upon to deal with rates as they exist, and in so doing we ordinarily consider them, not from the revenue standpoint, but rather from the commercial and traffic standpoint. At the same time it is now the settled law that there is a limit below which the revenue of railroads can not be reduced by public authority, and if there were no such constitutional limitation it would nevertheless behoove every regulating body to permit the existence of such

223. Florida Fruit & Vegetable Assn. v. Atlantic C. L. R. Co., 17 I. C. C. 552, 561.

224. R. R. Comrs. of Iowa v. Illinois Cent. R. Co., 20 I. C. C. 181, 186, citing Canada Southern

Ry. Co. v. International Bridge Co., 8 App. Cas. 731.

225. Advances in Rates—Western Case—20 I. C. C. 307, 379.

226. Advance in Rates—Eastern Case—20 I. C. C. 243, 248.

rates, when possible, as will yield just earnings to the rail-ways. The question of revenue is therefore fundamental and ever-present in all considerations as to the reasonableness of railroad rates, although it may not be and seldom is, where single rates are presented, the controlling question."

§ 127. **Same Subject.—Illustrative Cases.**—It has been the purpose of this chapter to give as comprehensively as possible the decision both of the Commission and Courts which show the principles which have been considered and applied in making rates. The principles stated herein illustrate the difficulty of the problem, but they furnish data from which some generalizations may be drawn. In recent volumes of the report of the decisions of the Commission there is in the index a title, Measure of Rates. Under this general title may be found references to the Commission's rulings relating to the "adjustment of rates," "advantages and disadvantages," "basis of rates," "branch line through thinly populated region," "burden of transportation," "capacity of boats," "car earning," categorical answers," "channels, depth of," "charging what traffic will bear," "circumstances and conditions," "classification," "commercial and economic conditions," "comparison of rates," "competition," "competitive rates," "cost," "cost of carriage," "cost of construction," "cost of handling," "cost of maintenance," "cost of operation," "cost of production," "cost of transportation," "cost of service," "density of traffic," "distance," "division of rates," "division of through rates," "earnings," "empty car movement," "equipment," "erroneous rates," "factor in through rates," "free movement of traffic," "harbor, condition of," "length of haul," "local rates," "long as well as short haul," "main line rates," "nature of commodity," "navigation, condition of," "paper rates," "past rates," "raw material," "relative rates," "return haul," "risk," "state rates," "three line haul," "ton mile earnings," "ton per mile rate," "tonnage," "train mile earnings," "transportation conditions," "trunk line rates," "two line haul," "use," "value of commodity," "value of service," "volume of traffic," voluntary rates," "voluntary reductions," "weak line," and "wharf and dock facilities."

And in one case the question of how a rate on a locomotive moving on its own wheels should be constructed was discussed.<sup>227</sup> Many other facts have been discussed in the opinions of the Commission. These but illustrate the correctness of the statement that "multitudinous facts must be considered."

The Transportation Act 1920, Sec. 15a adds "fair return" and defines the term, making such return a fact that must be considered. Prior to the passage of that Act, the Commission always, in a general system of rates, gave consideration to a fair return on the investment. The Amendment emphasizes this factor in rate making.

§ 128. **Same Subject—Discussion of Principles in Chicago Live Stock Exchange Case**—In speaking of the factors to be considered in rate-making,<sup>228</sup> Judge Bethea, citing authorities, said:

"A careful examination of the opinions of that court (as well as the evidence taken in these cases) shows that there are a great many factors and circumstances to be considered in fixing a rate. Noyes, *Am. R. R. Rates*, pp. 61 *et seq.* 85-109. Among other things: (1) The value of the service to the shipper, including the value of the goods and the profit he could make out of them by shipment. This is considered an ideal method, when not interfered with by competition or other factors. It includes the theory so strenuously contended for by petitioners, the commission, and its attorneys, of making the finished product carry a higher rate than the raw material. This method is considered practical, and is based on an idea similar to taxation. *Interstate Commerce Commission v. B. & O. Ry. Co.* (C. C.) 43 Fed. 37, 53; Noyes, *Am. R. R. Rates*, 53. (2) The cost of service to the carrier would be an ideal theory, but it is not practical. Such cost can be reached approximately, but not accurately enough to make this factor controlling. It is worthy of consideration,

227. *Re Investigation of Advance on Transportation of Locomotives and Tenders*, 21 I. C. C. 103.

228. *Int. Com. Com. v. Chicago G. W. R. Co.*, 141 Fed. 1003, 1045, 1016. Sustained in Supreme

Court, *Int. Com. Com. v. Chicago G. W. Ry. Co.*, 209 U. S. 108, 52 L. Ed. 705, 28 Sup. Ct. 493. In this case the order of the Commission in *Chicago Live Stock Exchange v. Chicago G.*

however. *Interstate Commerce Commission v. Baltimore & O. Ry. Co.*, 43 Fed. 37, 3 I. C. R. 192; *Ransome v. Eastern Counties Railway Company* (1857) I. C. B. N. S. 437, 26 L. J. C. P. 91; *Judson on Interstate Commerce*, §§ 148, 149; *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765; *Interstate Commerce Commission v. Detroit, Grand Haven & Milwaukee Railroad Co.*, 167 U. S. 633, 17 Sup. Ct. 986, 42 L. Ed. 306. (3) Weight, bulk and convenience of transportation. (4) The amount of the product or the commodity in the hands of a few persons to ship or compete for, recognizing the principle selling cheaper at wholesale than at retail. *Interstate Commerce Commission v. B. & O. Ry. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699. (5) General public good, including good to the shipper, the railroad company and the different localities. *Interstate Commerce Commission v. B. & O. Ry. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699. (6) Competition, which the authorities, as well as the experts, in their testimony in these cases, recognize as a very important factor. *Pickering Phillips v. London & Northwestern Railway Company*, 2 Q. B. D. (1882) 229 (this case construes section 2 of the English act of 1854, which is almost like section 3 of our interstate commerce act); *Interstate Commerce Commission v. B. & O. Ry. Co.*, *supra*; *Cincinnati, New Orleans & Texas Pacific Railway Company v. Interstate Commerce Commission*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935; *Interstate Commerce Commission v. Alabama Midland Railway Company*, 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414; *Louisville & Nashville Railroad Co. v. Behlmer*, 175 U. S. 648, 20 Sup. Ct. 209, 44 L. Ed. 309; *East Tennessee, Virginia & Georgia Railway Company v. Interstate Commerce Commission*, 181 U. S. 1, 21 Sup. Ct. 516, 45 L. Ed. 719; *Texas & Pacific Railway Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940; *Interstate Commerce Commission v. Louisville & Nashville Railroad Co.*, 190 U. S. 273, 23 Sup. Ct. 687, 47 L. Ed. 1047 The Supreme Court has also held that it may be presumed that Congress, in adopting the language of the English act, had in mind the construction given to the words "undue preference"

*W. R. Co.*, 10 I. C. C. 428, was held invalid.

by the courts of England. *Interstate Commerce Commission v. B. & O. Ry. Co.*, 145 U. S. 284, 12 Sup. Ct. 844, 36 L. Ed. 699.

"None of the above factors alone are considered necessarily controlling by the authorities. Neither are they all controlling as a matter of law. It is a question of fact to be decided by the proper tribunal in each case as to what is controlling."

§ 129. **Same Subject—Rate Considered in and of Itself.**—With reference to a rate "in and of itself," the Commission has said:<sup>229</sup>

"It is said that the rate from St. Cloud is reasonable in and of itself. A rate can seldom be considered "in and of itself." It must be taken almost invariably in relation to and in connection with other rates. The freight rates of this country, both upon different commodities and between different localities, are largely inter-dependent, and it is the fact that they do not bear a proper relation to one another, rather than the fact that they are absolutely either too low or too high which most often gives occasion for complaint."

In the *Cattle Raisers' Asso. case*,<sup>230</sup> the Commission discusses the cost to the carrier at originating and delivering points, cost and maintenance of equipment, expense of loading and reloading in transit incident to feeding, watering and resting the stock, character of the movement, number of cars in trains, average loading, volume and desirability of the traffic, return of empty cars, liability to damage, cost of carriage, increased cost of producing live stock, decreased selling price, method of making the advanced rates, disappearance of competition, cost of railroad labor and supplies, improved methods of operation and increased general traffic, mileage revenue per ton, per car and per train, and other pertinent circumstances and conditions.

§ 130. **Same Subject—Commission Not Bound by Technical Rules.**—In the investigation of these question the Commission is not hampered by technical rules. The Supreme Court, said:<sup>231</sup>

229. *Tileston Mill Co. v. Northern P. R. Co.*, 8 I. C. C. 346, 361.

230. *Cattle Raisers' Assn. v. Missouri, K. & T. R. Co.*, 11 I. C. C. 296.

231. *Int. Com. Com. v. Baird*, 194 U. S. 25, 44, 48 L. Ed. 860, 869, 24 Sup. Ct. 563.

"The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation, and it should not be hampered in making inquiry pertaining to interstate commerce by these narrow rules which prevail in trials at common law, where a strict correspondence is required between allegation and proof."

The Commission's right to consider the problem in all its phases was clearly stated by the Supreme Court, as follows:

"The Commission is the tribunal that is intrusted with the execution of the interstate commerce laws, and has been given very comprehensive powers in the investigation and determination of the proportion which the rates charged shall bear to the service rendered, and this power exists, whether the system of rates be old or new. If old, interests will have probably become attached to them and, it may be, will be disturbed or disordered if they are changed. Such circumstance is, of course, proper to be considered and constitutes an element in the problem of regulation, but it does not take jurisdiction away to entertain and attempt to resolve the problem. And it may be that there cannot be an accommodation of all interests in one proceeding." <sup>222</sup>

The Commission in discussing its own power said:

"It must be borne in mind that this Commission is not a court of law; its function is to apply the mandatory and restrictive provisions of the Act to Regulate Commerce to stated conditions of fact. We must regard the problems presented to us from as many standpoints as there are public interests involved." <sup>223</sup>

222. *Int. Com. Com. v. Chicago R. I. & P. R. Co.*, 218 U. S. 88, 108, 54 L. Ed. 946, 30 Sup. Ct. 669. See also *Atlantic C. L. R. Co. v. Florida*, 203 U. S. 256, 51 L. Ed. 174, 27 Sup. Ct. 108. See also *Seaboard A. L. Ry. Co. v. Florida*, 203 U. S. 261, 51 L. Ed. 175, 27 Sup. Ct. 109; and *post*, Section, 189.

223. *Advances in Rates*, —

*Western Case*, — 20 I. C. C. 307, 315; Theory on which case tried followed regardless of variance between allegation and proof. *Hecckle v. C. B. & Q. R. Co.*, 46 I. C. C. 513, 514; *New York Harbor Case*, 47 I. C. C. 643, 647; but "essential rules of evidence" must be preserved, *A. T. & S. F. Ry. Co. v. Spiller*, 246 Fed. 1, 158 C. C. A. 227.

§ 131. **Same Subject—Summary.**—The statement so frequently made and reiterated that the problem of rate-making is a difficult one, means no more than that there is no definite scientific rule by which it can, with certainty, be determined just what is a reasonable rate.

The "tribunal appointed by law and informed by experience" has evolved and is evolving principles which will furnish sufficient data to justify generalizations broad enough to authorize the deduction of scientific principles. In making these deductions, the first consideration is the agency which performs the service. This agency performs a public service, devotes its property to a public use and must, therefore, submit to public regulation; but the capital of this agency is private capital entitled to protection as such. To these facts the law applied the principle that those who furnish such private capital so devoted to a public use are entitled to receive a fair return from such investment. What is a "fair return" involves economic considerations such as the risks involved in the investment, the security of the investment because it is a practical monopoly, returns which capital may secure from other investments, as well as the public necessity that capital shall be devoted to this special use. "Fair return" necessarily involves the question of the value of the property so devoted to the public use. In determining this value there must be considered the investment, that made originally and that added in permanent improvements, the present market value of the stocks and bonds, which are but symbols of the investment, the question of the cost of the property, its reproduction cost and the methods of making the investment, that is, was the investment made wisely and honestly or otherwise. The character of the territory served by the carrier is not infrequently a fact which must not be lost sight of. The extent and regularity of the whole movement is determined by the character of the inhabitants and the kinds of business conducted by them. The physical situation of the agency as to grades, curves, etc., may materially affect the cost of the service and thereby determine the amount of the return which should be received.

The attitude of the agency to the question is not without value; the way the problem has been solved by the agency in

a long course of dealing would indicate that such agency has found a solution not unfair to itself.

The thing transported must be considered. Is it heavy as compared with the space it occupies? Does it require any special equipment? Is it subject to loss or injury in transporting? Is there much or little of it? The answers to these questions furnish facts which must be considered in classifying commodities so as to fix rates or charges for their transportation.

The places from and to which the commodities move are factors in the problem. The distance a thing is hauled must be considered, as the greater the distance the less ordinarily is the cost for each mile of the haul, and the service of loading and unloading applies the same to a short as to a long haul.

The situation of the man who owns the thing moved and the purpose of the movement frequently affects the question of the rate. This does not mean that rates must be determined by the use to which the commodity is put; it means that a producer of a commodity which is also produced by others in the same general territory, the market for all the producers being the same, cannot ship otherwise than upon rates not greatly higher than his competitors. This principle is similar to the one that justifies a rate basis made to meet market competition. A thing may grow or be mined in widely different localities, and the sale of the thing may be in the same market. Obviously that this market may have the benefit of competition and that producing localities may have the benefit of a market, distance cannot be made an absolute measure for the rates.

So the public interest must not be disregarded in determining what this public agency shall receive for performing the duties which society has farmed out to it. Rates must not be so adjusted as to deprive the public of the service, commodities must be moved and they cannot be moved if the charge therefor exceeds the value to be derived from the movement. One producer must not be permitted a monopoly in serving the public. That charges may not exceed the value of the service is an economic law depending upon neither court nor commission for its enforcement.

Carriers may with propriety and for the good of the general public make rates barely more than the cost of the particular movement, in order to develop industries, create and maintain competition and serve those who because of their location distant from the point of production cannot be otherwise served. Rate-making tribunals may not make rates so low as to deprive private capital of a substantial return on the fair value of the property devoted to the public use.

While long existing wrongs do not become rights and no one can have a vested interest in a wrong, the fact that in the slow evolution toward a science of rate-making there have grown up rate situations inconsistent with the principles which must exist when there is such a science, does not justify an abrupt and radical alteration of these situations. Existing conditions are facts which must be recognized in the application of all abstract economic principles, and while the principle is not destroyed by such recognition, it may be inapplicable to the particular situation.

To determine what is a reasonable rate, the law must be applied, economics considered and ethics invoked, and while the facts to be weighed are multitudinous and the scientific principles few, we may say that it is not fanciful to anticipate that a system of rate-making will be evolved which will approach justice. Shippers and carriers contending each with the other, sometimes selfishly, but not infrequently with an earnest desire for a right solution, presenting their theories to a disinterested and unbiased tribunal, "appointed by law and informed by experience," may furnish data which, being sifted, studied and classified in its reports, will enable that tribunal to solve the problem.

## CHAPTER IV.

### EQUALITY IN RATES.

- § 132. Scope of Chapter.
- 133. Common Law as to Equality in Rates by Carriers.
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- 135. Comparison of the English Railway and Canal Act with the Act to Regulate Commerce.
- 136. Discrimination Forbidden.
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- 138. Same Subject.
- 139. Same Subject. Construction by the Commission.
- 139a. Same Subject. Independent Contributing Causes.
- 140. Same Subject. Allowances to Shippers.
- 141. Trap Car Service.
- 142. Peddler Cars.
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- 143. Car Spotting.
- 144. Undue Preferences in Favor of Persons or Localities.
- 145. Same Subject. Application of Section made by the Commission.
- 145a. Differentials.
- 146. Discrimination against Traffic.
- 146a. Same Subject. Competition between Users of Related Rates.
- 147. Same Subject. Discrimination Beyond the Control of the Carrier.
- 148. Facilities for Interchange of Traffic and Rates and Charges to Connecting Lines Must Be without Undue or Unreasonable Preference.
- 149. Same Subject. Statute.
- 150. Same Subject. Statute and Proviso.
- 151. Through Routes and Joint Rates.
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177. Right of Carrier to Route Shipments Beyond Its Own Terminus.
178. Discrimination in Billing.
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181. Different Rates over the Same Line in Opposite Directions.
182. Discrimination by Granting Free Service.
183. Basing Points, Group Rates and Zone Rates.
184. How Far a Rate Made by a State Relieves a Carrier from the Duty to Serve Communities with Legal Equality.
185. Commutation. Mileage and Party Rate Tickets.
186. Rebates.
187. Same Subject. Corporation Punishable.
188. Summary

§ 132. **Scope of Chapter.**—A rate may be reasonable, and yet, because of its relation to other rates, unlawful as violative of the provisions of the Act to Regulate Commerce which require a just equality in rates.

Many of the facts affecting the reasonableness of rates must be considered in determining whether or not a rate is unlawfully discriminatory or preferential. While this is true, there are certain principles which have been specially applied to the question of equality in rates. It is the purpose of this chapter to state these principles with the application thereof that has been made, and to deduce therefrom, to the extent that may be, such rules as can be legally and properly applied. In do-

ing so, it must not be forgotten that the facts to be considered are numerous and of constantly varying force, that a definite measure for the determination of the legality of a rate has not been fixed and that a flexible judgment must be applied to situations as they arise, and that long established and generally accepted conditions cannot be abruptly changed, but that slow evolution is the concomitant of rate regulation.

§ 133. **Common Law as to Equality in Rates by Carriers.**—

The common law requirement as to the reasonableness of rates we have seen *supra*, sec. 61, was undisputed. Equality in rates was not so definitely provided for in that system of laws, and it has been doubted whether or not a carrier was bound to charge equal rates to all its customers. Discussing this question Mr. Justice Brown said:<sup>1</sup>

“Prior to the enactment of the act of February 4, 1887 (24 Stat. at L. 379), to regulate commerce, commonly known as the Interstate Commerce Act, railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service: (Fitchburg R. Co. v. Gage, 12 Gray, 393; Baxendale v. Eastern Counties R. Co., 4 C. B. N. S. 63; Great Western R. Co. v. Sutton, L. R. 4 H. L. 226, 237; Ex parte Benson, 18 S. C. 38; Johnson v. Pensacola & P. R. Co., 16 Fla. 632); though the weight of authority in this country was in favor of an equality of charge to all persons for similar services.”

That the common law required equality of service and charges under the same or similar circumstances more clearly appears from a subsequent decision of the Supreme Court in *Western Union Tel. Co. v. Call Publishing Co.*,<sup>2</sup> where Mr. Justice Brewer said:

1. *Int. Com. Com. v. Baltimore & O. R. Co.*, 145 U. S. 263, 36 L. Ed. 699, 703, 12 Sup. Ct. 844. See 3 Fed. Stat. Ann. 813.

2. *Western Union Tel. Co. v. Call Publishing Co.*, 181 U. S. 92, 45 L. Ed. 765, 21 Sup. Ct. 561.

“Common carriers, whether engaged in interstate commerce or in that wholly within the state, are performing a public service. They are endowed by the state with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and, even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination. To affirm that a condition of things exists under which common carriers anywhere in the country, engaged in any form of transportation, are relieved from the burdens of these obligations, is a proposition which, to say the least, is startling.”

Further in the opinion it was stated that “the principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional action,” and, we may conclude, that such principles required “equal rights both in respect to service and charges,” when the circumstances and conditions were the same; and where the circumstances and conditions were different, the difference in services and charges should bear a reasonable relation thereto.

§ 134. **Same Subject—Damages.**—In the *Parsons* case<sup>a</sup> the question discussed was not the *right* to “equality of charge \* \* \* for similar services,” but that opinion had reference to plaintiff’s right to recover damages under the special facts there involved. That inequality of charges for similar services was wrong was not questioned for, said the court: “Before any party can recover under the act he must show, not

3. *Parsons v. Chicago & N. W.* 231, 17 Sup. Ct. 887.  
R. Co., 167 U. S. 447, 42 L. Ed.

merely the wrong of the carrier, but that that wrong has in fact operated to his injury. If he had shipped to New York and been charged local rates he might have recovered any excess thereon over through rates. He did not ship to New York and yet seeks to recover the extra sum he might have been charged if he had shipped."

The same comment applies to the decision in the Coal case. That case was based upon the fact that the carrier had given to certain shippers what was decided to be a rebate and had not given the same allowances to the plaintiff suing. In the District Court the plaintiff recovered,<sup>4</sup> and the recovery was sustained by the Circuit Court of Appeals.<sup>5</sup> In the Supreme Court the judgment of the Circuit Court of Appeals was reversed and a new trial ordered, not because the plaintiff did not have a right of action, but because it had not shown that it had suffered legal damages.<sup>6</sup>

Neither of these cases denies that at common law a shipper had a right to equality of charges under similar circumstances, and in this respect neither conflicts with the statement of Mr. Justice Brown quoted in the preceding section. That equality of service from a public service company or corporation was a right at common law, seems to be, so far as the Supreme Court of the United States has spoken, undisputed. In order to recover damages for an invasion of this right proof of the fact of having suffered legal damages is necessary.

Where as under the Constitution of the United States, a schedule of rates may not be fixed less than will yield a fair return on the property employed in the public use, every customer of a public carrier is, to some extent, interested in what is charged every one else. It is true that an individual may not have a cause of action so long as what he pays is reasonable, unless the preference granted others damages him.

Neither under our statute nor under the common law is mere discrimination prohibited, but it will be found upon an

4. *International Coal Mining Co. v. Pennsylvania R. Co.*, 162 Fed. 996.

5. *Pennsylvania R. Co. v. International Coal Co.*, 173 Fed. 1, 97 C. C. A. 383.

6. *Pennsylvania R. Co. v. International Coal Co.*, 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893. See, following this case and citing authorities, *New Orleans Board of Trade v. Illinois C. R. Co.*, 29 I. C. C. 32.

examination of the English authorities, that where the circumstances and conditions were the same, those who dealt with a common carrier were entitled to equal treatment.

These principles are consistent with what, in 1916, the Commission announced as its settled doctrine.<sup>7</sup>

§ 135. **Comparison of the English Railway and Canal Act with the Act to Regulate Commerce.**—The remark of the Supreme Court in *Int. Com. Com. v. Baltimore & O. R. Co.*,<sup>8</sup> "that Congress in adopting the language of the English act, had in mind the construction given to these words by the English courts" had reference to section three of our act, although to a lesser extent the same could be said of section two.

Section two of the act of February 4, 1887, *post*,<sup>9</sup> § 345, known as the unjust discrimination clause, is based upon § 90 of the English Railway Clauses Act of 1845.<sup>9</sup> The section of the English act, called the Equality Clause, provided that "tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances." Section two of the Interstate Commerce Act used the words "under substantially similar circumstances and conditions," which phrase is not so exclusive as the words of the English act which requires equality only when the transportation is "over the same portion of the line of railway." The American act is, therefore, broader in its scope than the English act, but each act recognizes that "different circumstances" may justify different rates. The English statute uses the word "same" before "circumstances," ours uses the word "similar." This difference and the broader scope of the American act should be kept

7. *Astoria v. S. P. & S. Ry. Co.*, 38 I. C. C. 16, 24; See also *La Crosse Shippers Assn. v. Chicago & N. W. Ry. Co.*, 38 I. C. C. 453, 461-463, and Sec. 146 *a. post*.

8. *Int. Com. Com. v. Baltimore*

& O. R. Co., 145 U. S. 263, 36 L. Ed. 699, 703, 12 Sup. Ct. 844.

9. *Browne & Theobald Law of Railways* (English), p. 312. *Trammell, Railroad Commissioners of Georgia v. Clyde S. S. Co.*, 5 I. C. C. 324, 4 I. C. R. 120, 140.

in mind when considering the English decisions. Section two of the English Railway and Canal Traffic Act of 1854,<sup>10</sup> furnished the model of section three of our act.<sup>11</sup> The English and the American sections just referred to are each designated as the "undue preference clause." The fourth section of the American act, known as the "long and short haul clause," was unlike any section of the English act prior to 1887. In 1888 the Railway and Canal Traffic Act of that year gave the English Commissioners power to prohibit a higher charge for a less distance where the service is similar. The provision is the third paragraph of section twenty-seven and reads as follows:<sup>12</sup>

"The court or the commissioners shall have the power to direct that no higher charge shall be made to any person for services in respect of merchandise carried over a less distance than is made to any other person for similar services in respect of the like description and quantity of merchandise carried over a greater distance on the same line of railway."

This comparison may be concluded by quoting the language of the Commission as follows:<sup>13</sup>

"In a case purely of alleged undue preference or prejudice the English cases have direct application. Even in cases under our second and fourth sections, English cases brought under the undue preference clause in which the decision has held undue preference to exist, have value as showing how strictly the English commission or court has applied the broader language of the clause to a particular set of facts, but when English decisions under the undue preference clause are cited by a carrier in justification of its action under the strict language of our second and fourth sections, the citations have greatly diminished force. These sections apply only against rates in specific cases, but the undue preference clause or third section is inclusive; it applies both to rates

10. Browne & Theobald, *supra*, p. 405. Trammell Case, *supra*, note 5, this chapter.

11. *post*, Sec. 346, note 7, *supra*, this chapter.

12. Browne & Theobald, p. 771; see also sections 25 to 27

English Railway and Canal Traffic Act of 1888; Browne & Theobald, pp. 765 to 772.

13. Trammell, Railroad Commission of Georgia v. Clyde S. S. Co., 5 I. C. C. 324, 4 I. C. R. 120, 143, 144.

and facilities, and says generally to the carrier, you shall not in any manner unduly prefer one person or kind of traffic over another, and leave it to the commission or the court to say when the undue preference is given. In the second and fourth sections what is unlawful is clearly defined, the circumstances and conditions of the transportation being similar in substance. We think, therefore, that while English cases are valuable as defining undue preference or prejudice their value is greatly limited in cases where the statute itself describes the offense it declares unlawful."

§ 136. **Discrimination Forbidden.**—Equality of rights and privileges under "substantially similar circumstances and conditions" is sought to be guaranteed shippers and "particular descriptions of traffic" by sections two, three and four of the Act to Regulate Commerce. These sections, which were in the original Act and have been enlarged and retained in the Amendments, announce the principles of law fixing equality of charges and service by common carriers. These principles are supported and enforced by the provisions of the Act to Regulate Commerce which prohibit free passes, except under certain prescribed limitations; prohibit carriers from transporting commodities in which they are interested; require the making of switch connections; regulate the pooling of freights; require schedules of rates to be printed, posted and maintained; prevent changes in rates without at least thirty days notice unless where special permission is given to make changes on less notice; provide punishment for granting, receiving, or inducing the payment of rebates; punish false billing; require witnesses to testify, and prescribe methods of procedure for the public enforcement of the act and the protection of individuals who may suffer from its violation.

Inequality of charges is an evil that is more readily seen and keenly felt than are charges unjustly high. A difference in a freight charge of a few cents per hundred pounds on a particular commodity may mark the line between a reasonable and an unreasonable rate and the higher charge may be unjust and unreasonable. The injustice, however, is so distributed that no one feels seriously hurt and no complaint is made. A preferential or discriminatory charge may make

or unmake cities and individuals and may hurt some to the benefit of others. Such charges, therefore, are not only unjust and contrary to the very spirit of the American people, but they are sufficiently injurious to arouse to action those who are injured. The consumer usually pays the unjustly high rate, but the shipper or the community is injured, sometimes ruined, by the discriminatory rate. Under the once prevalent system of rebating, businesses were built up or destroyed by carriers. Even since rebating has practically ceased, cities are helped or injured by privileges given the one and withheld from the other. Rarely would carriers have complaints of rates if all rates and practices were adjusted without undue discrimination and unjust preference. Speaking of the evils existing before the Act to Regulate Commerce was passed by Congress and which evils the states had ineffectually attempted to remedy, the Supreme Court said:<sup>14</sup>

"These evils ordinarily took the shape of inequality of charges made, or of facilities furnished, and were usually dictated by or tolerated for the promotion of the interests of the officers of the corporation or of the corporation itself, or for the benefit of some favored persons at the expense of others, or of some particular locality or community, or of some local trade or commercial connection, or for the destruction or crippling of some rival or hostile line."

The problem of giving shippers a just equality is not an easy one of solution by the carriers. It is easier to know what is just equality than to adopt such rates and practices as will accomplish that end. Long existing injustice is hard to dislodge. A particular discrimination that has long continued in favor of a community, has become in the eyes of that community a vested right. It is hard for the beneficiary of a wrong to see that wrongs do not become rights by mere lapse of time. Carriers frequently welcome the aid of the Commission to help rid themselves of practices that are unjustly discriminatory.

§ 137. **Discrimination against Individuals.**—Section two of the Act to Regulate Commerce *post* section 345, was intended

14. *Int. Com. Com. v. Baltimore* L. Ed. 699, 703, 12 Sup. Ct. 844. & *O. R. Co.*, 145 U. S. 263, 36

to prevent different charges for different persons for a like and contemporaneous service to a like kind of traffic under substantially similar circumstances and conditions. Under the "same circumstances" and "goods of the same description" used in the English law are not used with reference to the contents of the parcels but to the parcels themselves, that is, like or different for the purposes of carriage. They are also used with reference to the conveyance of goods and not to the persons themselves.<sup>15</sup> This means, and the Act to Regulate Commerce has also been so construed, that competition, however great, can not justify charges to one person greater than those to another. Two shippers, shipping a like kind of traffic at the same time, over the same road are entitled to the same rate. It makes no difference that one may be in a position to ship over another line, or that his total shipments may greatly exceed those of the other. In *Wight v. United States*<sup>16</sup> the Supreme Court, speaking of the phrase "under substantially similar circumstances and conditions," said:

"For this case, it is enough to hold that that phrase as found in section 2, refers to the matter of carriage, and does not include competition."

In the *Troy Alabama case*,<sup>17</sup> the Supreme Court advanced the same ruling as follows:

"To prevent misapprehension, it should be stated that the conclusion to which we are led by these cases, that, in applying the provisions of the 3d and 4th sections of the act, which make it unlawful for common carriers to make or give any undue or unreasonable preference or advantage to any particular person or locality, or to charge or receive any greater compensation in the aggregate for the transportation

15. *G. W. Ry. Co. v. Sutton*, 38 L. J. Ex. 177, L. R. 4 H. L. 226, 22 L. T. 43, 18 W. R. 92.

16. *Wight v. United States*, 167 U. S. 512, 42 L. Ed. 258, 17 Sup. Ct. 822. See also *Int. Com. Com. v. Detroit G. H. & M. Ry. Co.*, 167 U. S. 633, 42 L. Ed. 306, 310, 17 Sup. Ct. 986; *Re Restricted Rates*, 20 I. C. C. 426, 433.

17. *Int. Com. Com. v. Alabama M. R. Co.*, 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45; *Pennsylvania R. Co. v. International Coal Mining Co.*, 173 Fed. 1, 97 C. C. A. 383; reversed on another point, *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893.

of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than a longer distance over the same line, in the same direction, competition which affects rates is one of the matters to be considered, is not applicable to the 2d section of the act.

"As we have shown in the recent case of *Wight v. United States*, 167 U. S. 512 (42 L. Ed. 258, 17 Sup. Ct. 822), the purpose of the second section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor, and we there held that the phrase "under substantially similar circumstances and conditions," as used in the second section, refers to the matter of carriage, and does not include competition between rival routes.

"This view is not open to the criticism that different meanings are attributed to the same words when found in different sections of the act; for what we hold is that, as the purposes of the several sections are different, the phrase under consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition, but that in the other sections, which cover the entire tract of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation—among which we find the fact of competition when it affects rates."

Kirkman, in the *Science of Railways*, vigorously argues against any governmental regulation of railroads, but he admits that there is no justice in distinguishing between persons. He says:<sup>18</sup>

"If a railroad refuses to one shipper what it concedes to another, everything being alike, article, place, time, quantity, risk, and service, that is not discrimination, but robbery. Petty instances of this kind have occurred in the history of railway management. But they are only instances. They are, however, the stock in trade of railway critics. They are un-

worthy of notice. They form no appreciable element, and are not to be compared for a moment to the benefits that grow out of the ability of carriers to adapt their properties to the varying needs of those they serve."

§ 138. **Same Subject.**—The equality required by section two of the Act is as to all persons for performing "a like and contemporaneous service" relating to a "like kind of traffic" transported "under substantially similar circumstances and conditions." The three quoted provisions are limitations on or exceptions to the general principle of equality. What then is meant by these phrases? In *Mitchell Coal & Coke Co. v. Penn. R. Co.*<sup>19</sup> the contention was made that "contemporaneous" must be confined to shipments made practically at the same moment of time, and that shipments as much as a month apart were too remote to come within the meaning of the statute. Obviously such a construction would destroy the practical effect of the law, and the court properly held that the word referred to rates in effect and meant "at the same time with the offending rates." In affirming this case in part, the Supreme Court recognized and applied this construction.<sup>20</sup>

"Like kind of traffic" permits a classification of different commodities but the phrase refers to the traffic itself, and not to the use to which it should be put nor to its ownership.

In Sec. 89 chapter three hereof is discussed the cases referring to the use of a commodity. Under the holdings of the Commission and the decisions of the courts, in the words "like kinds of traffic," like modifies traffic and not the use to which the traffic may be put.<sup>21</sup>

How "similar circumstances and conditions" has been construed is shown in the next preceding section. That different persons may own the commodities shipped constitutes no different circumstance or condition.<sup>22</sup> The words relate to the

19. *Mitchell Coal Co. v. Pennsylvania R. Co.*, 181 Fed. 403, 411.

20. *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916.

21. *Int. Com. Com. v. Baltimore & O. R. Co.*, 225 U. S. 326. 57

L. Ed. 1107, 32 Sup. Ct. 742. See also *Business Men's Ass'n v. Chicago, St. P. M. & O. R. Co.*, 2 I. C. C. 52, 2 I. C. R. 41.

22. *Int. Com. Com. v. Delaware, L. & W. Ry. Co.*, 220 U. S. 235, 55 L. Ed. 448, 31 Sup. Ct. 392, reversing *Delaware, L. & W. Ry.*

circumstance of carriage only." The provision require the same equality as to the incidents of transportation, the accessorial services, thus it is illegal to give a shipper a preference by the devise of leasing to him at a nominal charge land used in the transportation of his commodities." So it is illegal to concede a favored shipper the privilege of giving notes in payment of freight due." The rule of equality extends to demurrage." The provisions of the Elkins Act prohibiting rebates will be discussed in a subsequent section."

§ 139. **Same Subject—Construction by the Commission.**—In *Capital City Gas Co. v. Central V. R. Co.*" Mr. Commissioner Knapp, speaking for the Commission and having under consideration rates, one of which was made for coal when delivered to a connecting carrier for "railroad supply," and the other and higher of which was a combination rate applicable to coal used for commercial purposes and purposes other than "railroad supply," said:

"When bituminous coal is carried by defendants from Norwood to Montpelier the service is performed under substantially similar circumstances and conditions whether transported for a connecting railroad or for complainant and other consumers. \* \* \* \* \*

"We are constrained to hold that these facts, which are wholly undisputed, establish a discrimination forbidden by the second section of the act. In transporting bituminous coal from Norwood to Montpelier at 90 cents a ton for "railroad supply" the same service is performed and the circumstances and conditions of carriage are the same in every material effect as in transporting coal at \$1.85 per ton for

*Co. v. Int. Com. Com.* 166 Fed. 499. See as to persons, *Re Advances on Manganese Ore*, 25 I. C. C. 663, 668; *Re Commutation Tickets to School Children*, 27 I. C. C. 144.

23. *Pennsylvania R. Co. v. International Coal Mining Co.*, 173 Fed. 1, 97 C. C. A. 383. See Same Case, 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893.

24. *Southern Pacific Terminal*

*Co. v. Int. Com. Com.* 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279.

25. *United States v. Sunday Creek Co.*, 194 Fed. 252; affirmed same styled case, 210 Fed. 747.

26. *Lehigh Valley R. Co. v. United States*, 188 Fed. 879.

27. Sec. 371.

28. *Capital City Gas Co. v. Central Vermont R. Co.*, 11 I. C. C. 104, 105, 106, 107.

complainant and other consignees. This appears to be conceded since no proof was offered that the fact is otherwise. It follows, as we think, that the difference in rates is a violation of the statute.

*Wight v. United States*, 167 U. S. 512, 42 L. Ed. 258, 17 Sup. Ct. Rep. 822; *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144, 166, 42 L. Ed. 414, 423, 18 Sup. Ct. Rep. 45.

“In the former case it was held that the phrase ‘under substantially similar circumstances and conditions,’ as said in the second section, refers to the matter of carriage, and the decision therein rendered, as explained and confirmed in the subsequent case, condemns as unlawful the discriminating charges here considered. It is not permissible under this section for two or more carriers to establish a joint through rate, less than the sum of their locals, which is available only to a particular shipper or class of shippers, while denying such lower rate to other shippers of like traffic between the same points of origin and destination. In such case it may be said that the law presumes a common injury to those compelled to pay the higher rate because of the concession to the interest favored. If those defendants obtain only reasonable returns from their entire coal traffic, it may be well claimed that the rates charged complainant and other Montpelier consumers are higher than they would be but for the much lower rates allowed on coal for “railroad supply.”

“Moreover, if this view is correct, the absence of actual prejudice to complainant would not excuse the defendants. The most salutary law may doubtless be disregarded in some cases without injury and inflict a degree of hardship in other cases by its enforcement. Whatever may be said in that regard in the present instance, we are convinced, upon the authority of the decisions above cited, that the regulating statute does not permit the discrimination shown in this case and our ruling must so declare.”

The discrimination meant by the Act is everything that may affect the shipper, for, says the Commission: “That one shipper may not enjoy at the hands of a carrier advantages that are denied to other shippers is a principle asserted in

the Act throughout its various provisions,"<sup>29</sup> or, as subsequently stated by the Commission: "The fundamental principle of this Act, (the Act to Regulate Commerce), as so often stated by the Supreme Court, is one of fair play."<sup>30</sup>

**§ 139A. Same Subject. Independent Contributing Causes.**

The shipper's situation and the relation of other than the rates involved to similar rates paid by a competitor are facts which have their bearing when considering the question of unjust discrimination. The claim of one community that it is subjected to an unlawful disadvantage in rates therefrom to the advantage of a competing community is frequently sought to be met by proof that the complaining community enjoys lower rates thereto than the inbound rates of the competing community. In the language of traffic experts, the total of the "in and out" rates shows equality. Obviously that "in" rates are low does not justify unlawful "out" rates. This situation was illustrated in the several hearings and opinions which involved the claim of Shreveport, La., that her rates outbound into Texas were unlawful when contrasted with intrastate rates out bound from Texas points. In one of the opinions the Commission said:<sup>31</sup> "We are dealing here with outbound rates, and the reasonableness of such rates does not in any wise depend upon whether the articles taking those rates were produced at the points of shipment or came to those points by wagon, boat, railroad, or otherwise."

This language of the Commission states a correct principle, but the application of the principle must be limited to facts

29. *Brook-Rauch Mill & Elevator Co. v. Missouri Pac. Ry. Co.*, 17 I. C. C. 158, 164, citing *Eichenberg v. Southern Pac. Co.*, 14 I. C. C. 250, which latter case was approved by the Supreme Court in *Southern Pac. Terminal Co. v. Int. Com. Com.*, 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279.

30. *Mobile Chamber of Commerce v. Mobile & O. R. Co.*, 23 I. C. C. 417, 426. See *Kaufman Commercial Club v. T. N. O. R. Co.*, 31 I. C. C. 187, 171, where

it was said: "A just equality of opportunity for shipper and locality is required by law." A useful note and a valuable general discussion of the subject appears in the Law Edition containing the case of *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 62 L. Ed. 831, 38 Sup. Ct. 383.

31. *Railroad Com. of La. v. Arkansas H. T. Ry. Co.*, 41 I. C. C. 83, 118, 119; *Hutcheson Traffic Bureau v. C. R. I. & P. Ry. Co.*, 43 I. C. C. 689, 693.

similar to those involved in the particular opinion. When the inbound and outbound rates constitute in substance a through rate; as where the carriers serving both communities are wholly or partly responsible for both inbound and outbound rates to both communities, a different question is presented. In such cases the unlawfulness of the discrimination can only be determined by a comprehensive consideration of both sets of inbound and outbound rates."

§ 140. **Same Subject—Allowances to Shippers.**—Under the amendment of June 29, 1906, to the Act to Regulate Commerce, the owner of property transported rendering services in connection with the transportation or furnishing an instrumentality used therein is entitled to charge therefor." Such charge must be stated in the published tariffs," must not violate any of the sections of the Act requiring reasonable and non-discriminatory rates. Whenever allowances are made, being published in a tariff, are subject to complaint to the Commission and may be investigated by the Commission on its own initiative, and that tribunal may determine what allowance is legal and reasonable." Whether or not the amount allowed is reasonable must, like all charges relating to transportation, be determined by the facts and circumstances in each particular case having in view all relevant principles applicable to questions relating to the determination of the reasonableness and validity of rates. It is equally true that whether or not a particular allowance unjustly dis-

32. *St. Louis S. W. Ry. Co. v. United States*, 245 U. S. 136, 62 L. Ed. 199, 38 Sup. Ct. 49; *Pardee Works v. Central R. R. Co. of N. J.*, 39 I. C. C. 162, 164.

33. For statute see Sec. 404, *post*,

34. *American Sugar Refining Co. v. Delaware, L. & W. Ry. Co.*, 200 Fed. 652. While there have been rulings on the subject of this case not in accord with the general opinion on this point, the decision is correct. See *Re Allowances for Transfer of Sugar*,

14 I. C. C. 619; *Federal Sugar Refining Co. v. Baltimore & O. R. Co.*, 20 I. C. C. 200; *Baltimore & O. R. Co. v. United States*, 200 Fed. 779, *Opinion Commerce Court No. 38*, p. 499; *United States v. B. & O. R. Co.*, 231 U. S. 274, 58 L. Ed. 218, 34 Sup. Ct. 75; *Langdon v. Pennsylvania R. Co.*, 194 Fed. 486, 496.

35. *Suffern Grain Co. v. Illinois Cent. R. Co.*, 22 I. C. C. 178, 183; *Union Pac. R. Co. v. Updike Grain Co.*, 222 U. S. 215, 218, 56 L. Ed. 171, 32 Sup. Ct. 39.

criminate against other shippers presents a question determinable from the particular facts applicable to the special case. The Commission may not, when the shipper is within the provisions of the statute, deny to him a proper allowance.

The shipper who owns instrumentalities used in transportation or who is in a position to render services in connection therewith, who receives compensation for his services or pay for the use of his instrumentalities, cannot be said to be unfairly favored so long as the allowance or pay is not unreasonable and so long as others rendering like services or furnishing like instrumentalities are treated in the same way.

Examples of allowances are, for compressing cotton," grain doors," elevation of grain," staking cars," lighterage," transportation by tap lines and industrial lines." The question will be treated more in detail in later sections of this chapter where is discussed the question of whether or not the specific service or instrumentality upon which the claim for allowance is based justifies any allowance.

§ 141. **Trap Car Service.**—The Commission has defined this service as follows:" "The term trap or ferry, strictly speaking, is applied to a car placed at an industry or commercial house having a private siding, and there loaded by a shipper with less-than-carload shipments, and hauled by a carrier to its local freight or transfer station for handling and forwarding of contents; and also is applied to a car loaded with

36. *Merchants Cotton Compress & Storage Co. v. Illinois Cent. R. Co.*, 17 I. C. C. 98; *Anderson, Clayton & Co. v. Chicago, R. I. & P. Ry. Co.*, 18 I. C. C. 340.

37. *Balfour, Guthrie & Co. v. Oregon W. R. & N. Co.*, 21 I. C. C. 539.

38. *Union Pac. R. Co. v. Updike Grain Co.*, 222 U. S. 215, 56 L. Ed. 171, 32 Sup. Ct. 39; *Traffic Bureau Merchants Exchange v. Chicago, B. & Q. R. Co.*, 22 I. C. C. 496.

39. *Duluth Log Co. v. Minnesota & I. R. Co.*, 15 I. C. C. 627.

40. *United States v. B. & O. R. Co.*, *Federal Sugar Refining Co. Case.*, 231 U. S. 274, 58 L. Ed. 218, 34 Sup. Ct. 75. See also *Lighterage and Storage Regulations at New York*, 35 I. C. C. 47.

41. *Louisiana & P. Ry. Co. v. United States*, 209 Fed. 244; *Tap Line Cases*, 234 U. S. 1, 58 L. Ed. 1185, 34 Sup. Ct. 741; *Industrial Railways Case*, 29 I. C. C. 212; *Car Spotting Charges*, 34 I. C. C. 609.

42. *Trap or Ferry Car Service Charges*, 34 I. C. C. 516.

less-than-carload shipments which is hauled to and placed upon the private track of an industry or commercial house by the carrier from a local freight or transfer station. Where such cars are loaded to a prescribed minimum, the practice of respondent has been to make no charge for the service. In the eastern part of the territory involved the name 'ferry' is given to a car used as above described, and in the western part the name 'trap' is applied. The origin of the names is not clear. Both mean the same thing, and for convenience the word trap will be hereinafter used."

In the Five Per Cent Case<sup>43</sup> the Commission suggested that the carriers investigate special services being rendered by them with a view to eliminating those that were discriminatory and making proper charges for those which were legal. In Conference Ruling 97, the Commission said: "The Commission condemns as unlawful a practice under which a carrier provides an empty car at factory sidings in which the shipper may load less than-carload shipments which the carrier then moves to its regular freight station, where the shipments are assorted and placed in other cars to be forwarded to their respective destinations. Such a practice is lawful only under definite and clear tariff authority, nondiscriminatory in terms and in its application."

Ostensibly in compliance with the suggestion and the ruling of the Commission, but with a real desire that the practice be continued, tariffs were filed by the carriers in which charges were proposed for the trap car service. In the Trap Car Case *supra*, these tariffs were ordered canceled. The advantages from the service, both to the public and to the carriers, were shown, and it was held that the service when offered without undue preference or unjust discrimination, was not illegal. It is hardly open to successful contradiction that this service lessens the congestion which, without the service, would result to the carriers' terminal facilities.

§ 142. **Peddler Cars.**—In some parts of the United States the carriers have for many years maintained what has come to be called a peddler car service. This service has been defined in 32 I. C. C., 428 note 44, below as follows:

43. Five Per Cent Case, 31 I. v. P. Co., 39 I. C. C. 583, 584. C. C. 351, 408; Woolson Spice Co.

"The original arrangement permitted the sale from the cars, as peddlers from wagons, of fresh meats and packing-house products, but the growth of the business and economy of operation demanded that sales should be made prior to the shipment of the car, and that each package should be consigned to a particular consignee. The cars move from the packing houses, usually on certain days of each week, and the loading depends on sales made in advance, generally by salesmen of the packers who canvass the territory served by the peddler-car routes. When a packer has orders for a sufficient tonnage he makes arrangements with the carrier for the shipment and loads at his packing plant a refrigerator car owned by him which is usually equipped with meat hooks and other necessary appliances. Each car contains on the average less than 100 consignments, which are loaded in station order. The car is then forwarded by fast freight to the first destination to which there is a consignment, after which it is handled as way freight and the various consignments are unloaded by the carriers at the stations to which they are billed. \* \* \* It appears that the service rendered by the respondents in connection with the peddler cars is generally not greater, and in some instances less, than the service which they render in connection with less-than-carload traffic handled through their freight houses; that for the peddler-car service the user pays the regular less-than-carload rates, guarantees the carriers a minimum per-car earning, saves the carrier the expense of refrigeration, reduces loss and damage claims, and gives to the carrier a volume of traffic which could not be satisfactorily transported in its own equipment."

Such a service when performed without discrimination is not illegal."

§ 142 A. **Private Cars.**—Railway equipment has never been adequate to meet the demands of shippers, like meat packers

44. Investigation of Alleged Unreasonable Rates on Meats, 23 I. C. C. 656; Rules Governing Shipments of Freight in Peddler Cars, 32 I. C. C. 428; Rates and Rules on Shipments of Packing

House Products, 36 I. C. C. 62; Eastern Live Stock Case, 36 I. C. C. 675; Peddler Car Minimum, 43 I. C. C. 139; Swift & Co. v. P. C. C. & St. L. Ry. Co., 48 I. C. C. 525.

and oil distributors, who need special kinds of cars in which properly to distribute their commodities. Private cars were in use at the time of the adoption in 1887 of the original Commerce Act;" and in one of the earliest cases decided by the Commission it was held that the carriers should not allow their "own deficiencies in the particular (lack of proper cars) to be made the means of putting at an unreasonable disadvantage those who make use in the same traffic of the same facilities" supplied by the carriers."

The Commission made an exhaustive investigation of the use of private cars and the practices adopted in such use. It was held in an opinion based on such investigation that there were benefits to the public in the use of such cars and that while such use "has undoubtedly been of benefit to carriers, it has been of incalculable benefit to shippers as well." "The facts on which the Commission acted were principally those furnished by large shippers, owners of private cars, and the carriers. The carriers have always shown deference to these large shippers and are not over zealous in presenting facts in opposition to the wishes of shippers who control an immense volume of traffic.

Carriers should by pooling their cars or by other means supply suitable cars for all kinds of traffic. The private car owner has an advantage not open to all and "a privilege which, although ostensibly open to the whole public, can in the nature of things, only be taken advantage of by certain shippers, creates thereby a discrimination which may or may not be undue, according to the circumstances in each case."

The danger to the general public from permitting shippers to own their own cars has caused considerable discussion in the Congress; and in the Transportation Act 1920 the defini-

45. *Scofield v. Lake S. & M. S. R. Co.*, 2 I. C. C. 90, 2 I. C. R. 67; *United States v. P. R. Co.*, 242 U. S. 208, 61 L. Ed. 251, 37 Sup. Ct. 95.

46. *Rice v. Louisville & N. R. Co.*, 1 I. C. C. 722.

47. *Matter of Private Cars*, 50 I. C. C. 652, 672, 678.

48. *Traffic Bureau (St. Louis) v. C. B. & Q. R. Co.*, 14 I. C. C. 317. The National Association of Railway Commissions gave views similar to those in the text. *Procter & Gamble Co. v. C. H. & D. Ry. Co.*, 19 I. C. C. 556, 558, 559, 560.

tion of transportation was enlarged to include provisions relating to car service and car distribution.<sup>49</sup>

§ 143. **Car Spotting.**—Similar in principle to the trap car service is what has been called car spotting which is defined:<sup>50</sup> “‘Spotting’ service is the service beyond a reasonably convenient point of interchange between road haul or connecting carriers and industrial plant tracks, and includes: (a) One placement of a loaded car which the road haul or connecting carrier has transported, or (b) The taking out of a loaded car from a particular location in the plant for transportation by road haul or connecting carrier. (c) The handling of the empty car in the reverse direction.”

While the shipper where shipments are delivered at his plant or warehouse saves drayage, the carrier who makes the delivery is not using its terminals and the advantage is mutual. It is therefore a service which is not illegal *per se* and only becomes illegal when granted to one and refused to another under circumstances which cause that discrimination prohibited by law.<sup>51</sup>

§ 144. **Undue Preferences in Favor of Persons or Localities.**—Section three of the Act to Regulate Commerce we have seen is substantially the same as section two of English Railway and Canal Traffic Act of 1854.<sup>52</sup> This section is broader than section two of the English Act and prohibits undue or unreasonable preference. The words “undue” and “unreasonable” in the section show that in the legislative mind there could be a preference that was not unreasonable and that was legal. This has been the construction both of the English and the American statutes. The Supreme Court discusses English cases in the Party Rate Case,<sup>53</sup> and also con-

49. Section 344A, *post*.

50. Car Spotting Charges, 34 I. C. C. 609, 614; Alan Wood Iron & Steel Co. v. P. R. Co., 22 I. C. C. 540.

51. General Elec. v. N. Y. C. & H. R. Co., 14 I. C. C. 237; Los Angeles Case, 18 I. C. C. 310; Order sustained by Supreme Court, Los Angeles Switching

Case, 234 U. S. 294, 58 L. Ed. 1319, 34 Sup. Ct. 814; Atchison, T. & S. F. Ry. Co. v. U. S., 232 U. S. 199, 58 L. Ed. 568; 34 Sup. Ct. 291; Iowa & S. W. Ry. Co. v. C., B. & Q. R. Co., 32 I. C. C. 172.

52. Sec. 135, *infra*.

53. Int. Com. Com. v. Baltimore & O. R. Co., 145 U. S. 263, 36

strues both sections two and three. The Supreme Court in the case referred to refuse to enforce an order of the Commission and held that a party of ten or more could be legally carried on one ticket at a less rate for each individual than was charged for one person. In the course of the opinion Mr. Justice Brown said:

"In order to constitute an unjust discrimination under section 2, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate or other device; but, in either case, it must be for a 'like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions.' To bring the present case within the words of this section, we must assume that the transportation of ten persons on a single ticket is substantially identical with the transportation of one, and, in view of the universally accepted fact that a man may but, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible.

"In this connection we quote with approval from the opinion of Judge Jackson in the court below: 'To come within the inhibition of said sections (2 and 3), the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions. In respect to passenger traffic, the positions of the respective persons, or classes, between whom differences in charges are made, must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity and partiality resulting in undue advantage to one, or undue advantage to the other, in order to constitute unjust discrimination.'

"The English Traffic Act of 1854 contains a clause similar to section 3 of the Interstate Commerce Act, that 'no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company; or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or, company, or any particular description

of traffic, to any undue or unreasonable prejudice, or disadvantage in any respect whatsoever.'

"In *Hozier v. Caledonian R. Co.*, 17 Sess. Cas. 303, 1 Nev. & McN. R. Cas. 27, complaint was made by one who had frequent occasion to travel, that passengers from an intermediate station between Glasgow and Edinburgh were charged much greater rates to those places than were charged to other through passengers between these termini; but the Scotch Court of Session held that the petitioner had not shown any title or interest to maintain the proceeding; his only complaint being that he did not choose that parties traveling from Edinburgh to Glasgow should enjoy the benefit of a cheaper rate of travel than he himself could enjoy. 'It provides,' said the court, 'for giving undue preference to parties *pari passu* in the matter, but you must bring them into competition in order to give them an interest to complain.'

"This is in substance holding that the allowance of a reduced through rate worked no injustice to passengers living on the line of the road, who were obliged to pay at a greater rate. So, in *Jones v. Eastern Counties R. Co.*, 3 C. B. N. S. 718, the court refused an injunction to compel a railway company to issue season tickets between Colchester and London, upon the same terms as they issued them between Harwick and London, upon the mere suggestion that the granting of the latter, the distance being considerably greater, at a much lower rate than the former, was an undue and unreasonable preference of the inhabitants of Harwick over those of Colchester. Upon the other hand, in *Ransome v. Eastern Counties R. Co.*, 1 C. B. N. S. 437, where it was manifest that a railway company charged Ipswich merchants who sent from thence coal which had come thither by sea, a higher rate for the carriage of their coal than they charged Peterboro merchants, who had made arrangements with them to carry large quantities over their lines, and thus the sums charged the Peterboro merchants were fixed so as to enable them to compete with the Ipswich merchant, the court granted an injunction upon the ground of an undue preference to the Peterboro merchants, the object of the discrimination being to benefit the one dealer at the expense of the other, by depriving the latter of the natural advantages of his position. In *Oxlade*

v. *Northeastern R. Co.*, 1 C. B. N. S. 454, 26 L. J. C. P. 129, 1 N. & Mac. 72, a railway company was held justified in carrying goods for one person for a less rate than that at which they carried the same description of goods for another, if there be circumstances which render the cost of carrying the goods for the former less than the cost of carrying them for the latter, but that a desire to introduce northern coke into a certain district was not a legitimate ground for making special agreements with different merchants for the carriage of coal and coke at a rate lower than the ordinary charge, there being nothing to show that the pecuniary interests of the company were affected; and that this was an undue preference.

"In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge. These traffic acts do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long and short haul clause of the act, or would be open to the charge of unjust discrimination. But so far as relates to the question of 'undue preference,' it must be presumed that Congress, in adopting the language of the English act, had in mind the construction given to these words by the English courts, and intended to incorporate them into the statute. *McDonald v. Harvey*, 110 U. S. 619 (28 L. Ed. 269, 4 Sup. Ct. 142)."

In the same case Circuit Judge Jackson, afterwards Mr. Justice Jackson, said:<sup>54</sup> "In passing upon the question of undue or unreasonable preference or disadvantage, it is not only legitimate, but proper, to take into consideration, besides the mere differences in charges, various elements, such as the convenience of the public, the fair interest of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the

L. Ed. 699, 705, 12 Sup. Ct. 844,  
4 I. C. R. 92.

54. *Int. Com. Com. v. Baltimore & O. R. Co.*, 43 Fed. 37, 53, 54,  
3 I. C. R. 192; This principle

was applied in *Galloway Coal Co., v. A. G. S. R. Co.*, 40 I. C. C. 311, 320; *Nashville Switching*, 40 I. C. C. 474, 482.

company and the situation and circumstances of the respective customers with reference to each other, as competitive or otherwise."

§ 145. **Same Subject—Application of Section Made by the Commission.**—There have been a great many cases in which the Interstate Commerce Commission has applied section 3 of the Commerce Act. A clear and fair reading of the law, says the Commission, "is one which credits Congress with the intention of stopping all undue discrimination by interstate carriers. It may be said without exaggeration that it is the paramount duty of interstate carriers under this Act to avoid discrimination." "

The law is not satisfied because a rate may not be unreasonably high, for, as said by the Commission:

"A community is entitled to something more than a reasonable rate; it is entitled to a nondiscriminatory rate. The carrier may not say, 'We will give to this community a reasonable rate' and meet the full requirements of the law; it must view its rates as a whole and see to it that they affect no advantage or preference to one community over another which does not arise necessarily out of the transportation advantages which the one has over the other.' "

The prohibitions of the section apply to all the carrier's duties and obligations, to facilities and to through routes, for, as said by the Supreme Court and quoted by the Commission, the carrier "is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all its patrons upon an absolute equality." "

Nor does the fact, that removing unjust discrimination

55. R. R. Com. of La. v. St. Louis S. W. Ry. Co., 23 I. C. C. 31, 41 (Shreveport Case); order sustained by the Supreme Court, *Houston E. & W. T. R. Co. v. United States*, 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833.

56. R. R. Com. of Nevada v. Southern Pac. Co., 21 I. C. C. 329,

366, quoted with approval in *Topeka Traffic Assn. v. Alabama & V. Ry. Co.*, 27 I. C. C. 428, 436.

57. *Union Pac. R. Co. v. Goodridge*, 149 U. S. 680, 37 L. Ed. 896, 13 Sup. Ct. 970, quoted in *Re Wichita Falls System Joint Coal Rates*, 26 I. C. C. 215, 223.

may reduce revenues, constitute an answer to the claim for "fair play." " "

"Nor is it the view of the Commission that a carrier cannot be held to discriminate against a community or territory which it does not reach by its own rails. If it participates in a joint rate from the territory affected and is in such position that it may either join in such rates or decline to do so, it is then liable for the discrimination which may result from its action in joining with the other carriers in the discriminatory rate or regulation." " "

The Commission formerly had no power to compel carriers to increase rates, so when there was discrimination in rates between two communities, unless the carrier removed such discrimination the high rate must have been reduced." Under Transportation Act 1920 the Commission is empowered to prescribe minimum rates. Whether or not a preference or advantage is undue or unreasonable within the meaning of the section is "primarily for the investigation and determination of the Interstate Commerce Commission and not for the Courts. The dominating purpose of the Statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose." " "

58. *Cardiff Coal Co. v. Chicago, M. & St. P. Ry. Co.*, 13 I. C. C. 460, 467.

59. *Partridge & Sons v. Pennsylvania R. Co.*, 26 I. C. C. 484, 486, 487 citing: *Indiana Steel & Wire Co. v. Chicago, R. I. & P. Ry. Co.*, 16 I. C. C. 155; *Southern Furniture Mnfrs. Assn. v. Southern Ry. Co.*, 25 I. C. C. 379; *Rates from the Walsenberg Coal Field*, 26 I. C. C. 85. See also *Chamber of Commerce of Ashburn, Ga., v. Georgia, S. & F. R. Co.*, 23 I. C. C. 140, and a summary of Commission cases cited pp. 148, 149, 150.

60. *Rates Transportation of Fresh Meats & Packing House*

*Products*, 23 I. C. C. 652, 655; *Scott Paper Co. v. Pennsylvania R. Co.*, 26 I. C. C. 601, 603.

61. *Simpson v. Shepard*, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729, citing *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350, 9 Ann. Cas. 1075; *Baltimore & O. R. Co. v. United States*, 215 U. S. 481, 54 L. Ed. 292, 30 Sup. Ct. 164; *Robinson v. Baltimore & O. R. Co.*, 222 U. S. 506, 56 L. Ed. 288, 32 Sup. Ct. 114; *United States v. Pac. & A. R. N. Co.*, 228 U. S. 87, 57 L. Ed. 742, 33 Sup. Ct. 443. Disadvantages unconnected with transportation should not be equalized by rates.

§ 145A. **Differentials.**—A rate differential is a fixed difference in rates, so that as one rate is changed the other is similarly changed, thus maintaining the original difference. There are many rates differentially related. Where the difference is just, existing differentials are always sustained by the Commission. Differentials that are unreasonable are changed to make them reasonable." Where independent carriers served a common market differential adjustments, removing unlawful discrimination, could not be prescribed by the Commission prior to the Amendment of 1920," but now the Commission may initiate both minimum and maximum rates.

§ 146. **Discrimination against Traffic.**—The section prohibits "any undue or unreasonable preference or advantage to \* \* \* any particular description of traffic."

In discussing classification, section 81 *supra*, it has been shown that different commodities have been classified or given a special commodity rating. The necessity and propriety of this is there shown. When, however, a particular "description of traffic" is classified, it must be without undue or unreasonable preference.

In determining the reasonableness of rates, comparisons may be made between commodities of like weight, bulk, value, etc., regardless of whether or not those commodities come in competition the one with the other.

§ 146A. **Same Subject—Competition Between Users of Related Rates.**—In determining whether or not particular descriptions of traffic are so related by the carrier as to violate the provisions quoted herein, it is material to determine whether or not the different commodities in any way compete. This principle has been applied by the Commission. As early as 1892 the Commission said: "In the absence of some competing relation between different articles of traffic, there would

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| Anson, Gilkey & Hurd Co. v. S. P. Co., 33 I. C. C. 332; Milling Logs In Transit, 40 I. C. C. 597, 600. | C. 224, 236.<br>63. Gallaway Coal Co. v. A. G. S. R. Co., 40 I. C. C. 311, 315, and cases cited. |
| 62. Memphis Freight Bureau v. St. L. I. M. & S. Ry. Co., 39 I. C.                                      | 64. Rice v. C. W. & B. R. Co., 3 I. C. R. 841, 849, 5 I. C. C. 193.                              |

seem to be no opportunity, by means solely of the rates imposed upon them respectively, for that unjust discrimination which the law forbids. Disadvantage to the shipper of one product can hardly be predicated upon the charges for transporting another product, differing essentially in character from the former and widely dissimilar in the demands which it supplies. In such cases the rates themselves are insufficient to convict the carrier of discrimination. The amount actually charged on one commodity may, however, be of great importance in determining whether the charge on another commodity is reasonable or otherwise, especially when both have numerous points of resemblance in respect to the cost and hazard of transportation."

The United States Circuit Court, the English Court and the Supreme Court as shown in the Party Rate Case, Section 144, *supra*, all recognized that without competition unlawful discrimination could not exist.

Illustrative of other applications of the principle are: Wall plaster and cement were sought to be compared, and it was said: "It is admitted that a charge of undue discrimination may not be predicated on the lower cement rates, because the commodities are not competitive." "In denying relief where competition between localities was alleged, the Commission said: "It does not appear that there is such a competitive relation between Baton Rouge and New Orleans in respect of the commodity in question that different rates to these points are *prima facie* unlawful.""

Between the rates on wheat and coarse grain, which are "competitive in no practical sense," "and between rates on poles and lumber," there can be no undue or unlawful preference because of lack of competition.

65. Acme Cement Plaster Co. v. Lake Shore & M. S. Ry. Co., 17 I. C. C. 30, 36.

66. Southern Bitulithic Co. v. Illinois C. R. Co., 17 I. C. C. 300.

67. Board of Trade of Chicago v. Chicago & A. R. Co., 27 I. C. C. 530, 535.

68. California Pole & Piling Co. v. Southern Pac. Co., 27 I. C. C. 670; See also Texarkana Freight

Bureau v. St. L. I. M. & S. Ry. Co., 43 I. C. C. 224, 226; Laundrymen's Nat'l. Assn. v. Adams Express Co., 45 I. C. C. 361, 362 (laundry & bread); Kansas City & M. Ry. Co. v. St. L. & S. F. R. Co., 46 I. C. C. 464, 465. The general question was interestingly discussed by Henry Hull, Case & Comment, April 1918.

§ 147. **Same Subject—Discrimination beyond the Control of the Carrier.**—On this subject the Supreme Court has said:"

"The prohibition of the 3d section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers." 70

Many past discriminations have been defended on the ground that the particular carrier complained against could not remedy the situation; the claim being made that the conditions had grown up and existed without the aid and contrary to the wishes of the carrier.

Such a claim cannot, however, be successfully maintained to prevent the establishment of joint rates, through combination rates having been voluntarily established.<sup>71</sup> Controlling competition may justify a rate situation which would be otherwise unlawful.<sup>72</sup> The "test of the discrimination is the ability of one of the carriers \* \* \* to put an end to the discrimination by its own act."<sup>73</sup>

Length of time that an unreasonable preference has existed will not justify it. Judge Taft, in *East Tenn., Va. & Ga. Ry. Co. v. Int. Com. Com.*, note 70 *supra*, said:

"We are pressed with the argument that to reduce the rates to Chattanooga will upset the whole southern schedule of rates, and create the greatest confusion; that for a decade Chattanooga has been grouped with towns to the south and west of her, shown in the diagram; and that her rates have

69. *East Tenn. Va. & Ga. Ry. Co. v. Int. Com. Com.*, 181 U. S. 1, 18, 45 L. Ed. 719, 725, 21 Sup. Ct. 516.

70. *East Tenn., Va. & Ga. Ry. Co. v. Int. Com. Com.*, 99 Fed. 52, 63, 39 C. C. A. 413, 425. See also *Board of Trade of Chicago v. Chicago & A. R. Co.*, 4 I. C. C. 158, 3 I. C. R. 233.

71. *St. Louis & S. W. Ry. Co. v. United States*, 245 U. S. 136, 62

L. Ed. 199, 38 Sup. Ct. 49.

72. *Eastern Shore, etc. Produce Exchange v. N. Y. P. & N. R. Co.*, 40 I. C. C. 328, 334 and cases cited.

73. *Ashland Fire Brick Co. v. S. Ry. Co.*, 22 I. C. C. 115; *Traffic Bureau, Toledo v. C. H. & D. Ry. Co.*, 43 I. C. C. 446, 456; *Commercial Club of Mitchell v. A. & W. Ry. Co.*, 48 I. C. C. 40, 43.

been the key to the southern situation. The length of time which an abuse has continued does not justify it. It was because time had not corrected abuses of discrimination that the Interstate Commerce Act was passed."

From these authorities it is seen that in determining whether or not undue preference exists all the surrounding facts and circumstances must be considered, including competition and the interests of the public and the carriers. The commerce of this vast country could not be transacted unless carriers were allowed to meet market and other competition by taking all traffic that increases receipts more than expenditures. Nor are shipper seemingly discriminated against by this lower competitive traffic, really subjected to unjust and unreasonable discrimination or preference. If this cheaper rate traffic pays any profit, it, to that extent, increases the revenues of the carrier and enables it better to perform its public duties. As said by W. B. Dabney (*The Public Regulations of Railways*, 111, 113): "Discrimination which produces no injury cannot be considered unjust; if it can be shown that discrimination may in certain cases be actually beneficial to the community apparently discriminated against, it should, instead of being denounced, be encouraged. It is not the commerce of one nation or continent alone, that determines the conditions of transportation within its limits, but that of the civilized world." Carriers, however, cannot use these arguments to do more than meet the situations presented by the circumstances and conditions, and any discrimination in excess of that required by the different conditions is unjust and unreasonable."

§ 148. **Facilities for Interchange of Traffic and Rates and Charges to Connecting Lines Must be Without Undue or Unreasonable Preference.**—Prior to the Interstate Commerce Act a carrier was not compelled to form a business connection with another carrier and was not compelled to "afford all reasonable, proper, and equal facilities for the interchange of traffic" with connecting carriers. In *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*,<sup>74</sup> a bill was brought by the Denver

74. As to competition see *Ante* made by a state, Sec. 44 *ante*.  
Section 146a, *post*, Sec. 201. Rates 75. *Atchison, T. & S. F. Ry. Co.*

company to compel the Atchison company to unite with it in forming a through line of railroad transportation with all the privileges as to exchange of business that were customary with connecting carriers and that were then conceded to a competitive line of complainant. It appears from the evidence that it was the custom of connecting lines to make arrangements with reference to the interchange of business and the formation of through lines. Of the facts, the court said:

"A large amount of testimony is found in the record, as to the custom of connecting roads in respect to the interchange of business and the formation of through lines. From this it appears that, while through business is very generally done on through lines formed by an arrangement between connecting roads, no road can make itself a part of such a line, so as to participate in its special advantages, without the consent of the others. Oftentimes new roads, opening up new points, are admitted at once on notice, without a special agreement to that effect or in reference to details; still, if objection is made, the new road must be content with the right to do business over the line in such a way as the law allows to others that have no special contract interest in the line itself. The manner in which its business must be done by the line will depend not alone on the connection of its track with that of the line, but upon the duty which the line as a carrier owes to it as a customer. No usage has been established which requires one of the component companies of a connecting through line to grant to a competitor of any of the other companies the same privileges that are accorded to its associates, simply because the tracks of the competing company unite with its own and admit of a free and convenient interchange of business. The line is made up by the contracting companies to do business as carriers for the public; and companies, whose roads do not form part of the line, have no other rights in connection with it than such as belong to the public at large, unless special provision is made therefor by the legislature or the contracting companies."

The decree entered by the trial court had fixed in detail, rules and regulations for the working of the Atchison, Topeka and Santa Fe and Denver and New Orleans roads, in connection with each other as a connecting through line and, in

effect, required the Atchison, Topeka and Santa Fe Company to place the Denver and New Orleans Company on an equal footing as to the interchange of business with the most favored of the competitors of that company, both as to prices and facilities, except in respect to the issue of through bills of lading, through checks for baggage, through tickets and, perhaps, the compulsory interchange of cars.

The Supreme Court goes somewhat at length into the history of state legislation with reference to connections between carriers and holds that "such matters are and always have been proper subjects for legislative consideration" and that remedies for failure to make connections or to make connections without discrimination "can only be obtained from the legislative branch of the government." The court then discussed the "undue preference clause" of the English Railway and Canal Traffic Act of 1854 and said:

"Were there such a statute in Colorado, this case would come before us in a different aspect. As it is, we know of no power in the judiciary to do what the Parliament of Great Britain has done and what the proper legislative authority ought perhaps to do, for the relief of the parties to this controversy.

"All the American cases to which our attention has been called by counsel relate either to what amounts to undue discrimination between the customers of a railroad, or to the power of a court of chancery to interfere, if there be such a discrimination. None of them hold that, in the absence of statutory direction or a specific contract, a company having the power to locate its own stopping places can be required by court of equity to stop at another railroad junction and interchange business, or that it must under all circumstances give one connecting road the same facilities and the same rates that it does to another with which it has entered into a special contract relations for a continuous through line and arrange facilities accordingly. These cases are all illustrative in their analogies, but their facts are different from those we have now to consider."

The decree of the circuit court was reversed, with instructions to dismiss the bill without prejudice. This case was decided in 1883, and clearly points out the evils sought to be

remedied by this section of the Act to Regulate Commerce. In *Wisconsin, M. & P. R. Co. v. Jacobson*,<sup>76</sup> the Supreme Court had before it a case from the Supreme Court of Minnesota to review the judgment of that court affirming the judgment of the district court, directing the plaintiff in error and the Willmar & Sioux Falls Railway Company to make track connections with each other at Hanley Falls, in the state of Minnesota, where their respective tracts intersected.

The judgment of the state court declared as follows:

"That it is the duty of the defendants, the Wisconsin, Minnesota & Pacific Railroad Company and the Willmar & Sioux Falls Railway Company, and they should be and are required to forthwith provide at the place of intersection of their said roads at said Hanley Falls, ample facilities by track connections for transferring any and all cars used in the regular business of their respective lines of road from the line of tracks of one of said companies to those of the other, and to forthwith provide, at said place of intersection, equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding, and delivering property and cars to and from their respective lines."

The court discussed somewhat at length the legal principle that railroads are public highways, upon which fact rests the right and duty of the government to regulate, in a reasonable and proper manner, the conduct of their business, and the substance of its opinion affirming that of the state Supreme court is contained in two paragraphs of the opinion, as follows:

"We think this case is a reasonable exercise of the power of regulation in favor of the interests and for the accommodation of the public, and that it does not, regard being had to the facts, unduly, unfairly, or improperly affect the pecuniary rights or interests of the plaintiff in error."

"In this case the provision is a manifestly reasonable one, tending directly to the accommodation of the public, and in a manner not substantially or unreasonably detrimental to the ultimate interests of the corporation itself."

v. *Denver & N. O. R. Co.*, 110 U. S. 667, 28 L. Ed. 291, 4 Sup. Ct. 185.

76. *Wisconsin M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. Ed. 194, 21 Sup. Ct. 115.

§ 149. **Same Subject—Statute.**—The second paragraph of section three of the Act to Regulate Commerce," as originally enacted, required common carriers subject to the act to afford reasonable, proper and equal facilities for the interchange of traffic and prohibited discrimination in the rates and charges of connecting lines, but did not require them to give the use of their tracks or terminal facilities to another carrier engaged in like business. This provision of the law did not apply where the circumstances and conditions were dissimilar."<sup>77</sup> As to its tracks and terminal facilities, a common carrier was under the former law left free to allow their use by one or more connecting lines to the exclusion of others;" but as will be seen in a subsequent section, this right of selection has been limited by subsequent enactments and decisions.

This section did not compel a carrier to establish through routes and joint rates, and any carrier could select from two or more connecting carriers those whom it would employ as its agents to send freight beyond its own line."<sup>78</sup> This power to require the establishment of through routes and joint rates has been given to the Commission by sections one and fifteen of the Act as amended by the Act of June 29, 1906. The owner of a private wharf, however, cannot be compelled except by condemnation and upon compensation being made for the taking of the property, to allow its use by others."<sup>79</sup>

Since the Amendment of 1906 it has been the duty of each carrier subject to the Act to Regulate Commerce to "hold it-

77. Sec. 347, *post*.

78. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567, 624, 2 L. R. A. 289, 2 I. C. R. 351; *New York & N. Ry. Co. v. New York & N. E. Ry. Co.*, 50 Fed. 867.

79. *Little Rock & M. Ry. Co. v. St. Louis, I. M. & S. Ry. Co.*, 59 Fed. 400. Affirmed. 63 Fed. 775, 11 C. C. A. 417, 26 L. R. A. 192. *Oregon S. L. & U. N. Co. v. Northern Pac. R. Co.*, 51 Fed. 465. Affirmed. 61 Fed. 158, 9 C. C. A. 409; *Atchison, T. & S. F. Ry. Co. v. Denver & N. O.*

*R. Co.*, 110 U. S. 667, 28 L. Ed. 291, 4 Sup. Ct. 185; *Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co.*, 86 Fed. 407, 30 C. C. A. 142.

80. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567, 630; *Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co.*, 73 Fed. 438.

81. *Louisville & N. R. Co. v. West Coast Naval Stores Co.*, 198 U. S. 483, 49 L. Ed. 1135, 25 Sup. Ct. 745; *Weems Steamboat Co. v. People's Co.*, 214 U. S. 345, 53 L. Ed. 1024, 29 Sup. Ct. 661.

self impartial as between shippers and give to each one equal terminal facilities and service.”<sup>82</sup> It is not illegal for a carrier to give an exclusive privilege to a public auctioneer to conduct auctions.”<sup>83</sup>

§ 150. **Same Subject—Statute and Proviso.**—Section three of the Act to Regulate Commerce, prior to Transportation Act 1920 provided:

“But this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.”

In discussing this proviso, the Commission held, that where carriers allowed the “use of their tracks, or terminal facilities, the proviso of section 3 can have no application;” and in the further course of the opinion in the same case it was said:

“Terminals are either open or they are not; and if a carrier holds itself out as ready to permit the use of its tracks at a certain charge, the fact that such charge may be prohibitive does not mean that the terminals are not open. On the contrary, it would seem to be a potent argument for the reduction of charges for the use of tracks or terminal facilities already extended.”

And, said the Commission, concluding the argument:

“It follows, that having elected to perform this service, the charge therefor must be reasonable.”<sup>84</sup>

This section to this point and the two next preceding sections discuss the law prior to the Amendment of 1920. By that amendment, paragraph 2 of section 3 of the original Act was

82. *Enterprise Fuel Co. v. Pennsylvania R. Co.*, 16 I. C. C. 219, 224; *Baltimore Butchers Abattoir & Live Stock Co. v. Philadelphia, B. & W. R. Co.*, 20 I. C. C. 124, 128; *Buffalo Union Furnace Co. v. Lake Shore & M. S. Ry. Co.*, 21 I. C. C. 620.

83. *Southwestern Produce Distributors v. Wabash R. Co.*, 20 I. C. C. 458.

84. *Merchants & Mnfrs. Assn. v. Pennsylvania R. Co.*, 23 I. C. C. 474, 476. The principle was

followed in *St. Louis S. & P. R. Co. v. Peoria & P. U. R. Co.*, 26 I. C. C. 226, 236, 237; *Penn. Co. v. United States*, 236 U. S. 351, 59 L. Ed. 616, 35 Sup. Ct. Rep. 370: affirming same styled case, 214 Fed. 445; *Louisville & N. R. Co. v. United States* 238 U. S. 1, 59 L. Ed. 1177, 35 Sup. Ct. 696. “Grazing but not hitting,” so says Mr. Justice Holmes, the question in *Louisville & N. R. Co. v. United States*, 242 U. S. 60, 61 L. Ed. 153, 37 Sup. Ct. 61.

changed for the first time. The Amendment authorizes the Commission to do what the Supreme Court in the Nashville Switching Case, 242 U. S. 60, held that it could not do under the law then in force. The cases cited in those sections, not excepting the Nashville Switching Case, show a strong probability that the Supreme Court will sustain the validity of the 1920 Amendment requiring the joint use of terminals."

§ 151. **Through Routes and Joint Rates.**—The statutory duty of the carriers to establish and maintain through routes and joint rates, together with the statutory power of the Commission in respect thereto, will be discussed in another connection." The question of discrimination is the subject of this section.

Mr. Commissioner Lane, in an opinion of the Commission dealing with the question, asked: "What is the duty of the carriers with respect to the operation of through routes?" And he also asks: "What power has been vested in the Commission to enforce the requirements of the law?" Answering the first question he said:

"There can be little doubt as to the duty of the carriers under the present act. The commerce of the country is regarded as national, not local, and the railroads are required to serve the routes which they have established, or which they have been required to establish." The statute is then quoted, and analyzed and in further answer to the first question, the opinion proceeds: "Reading these provisions together, there can be no doubt as to the intent of Congress. Our railroads are called upon to unite themselves that they will constitute one national system; they must establish through routes, keep these routes open and in operation, furnish the necessary facilities for transportation, make reasonable and proper rules of practice as between themselves and the shippers, and as between each other. The full burden of this great obligation is in the first instance cast upon the carriers themselves."

As to the second question, it was there said:

"The law's requirements as to the duty of the carrier to

85. For amendment see Sec. 245 U. S. 136, 62 L. Ed. 199, 38  
347, *post*. Compare St. Louis Sup. Ct. 49.  
S. W. R. Co. v. United States 86. *post*, sec. 195.

the shipper to furnish equipment and maintain its through routes carries with it necessarily the power on the part of the Commission to enforce rules which will permit the free interchange of traffic as between carriers. The carriers must keep their through routes open, and if they fail to do this because of the diversion or appropriation of cars this Commission has it within its power to prescribe the conditions upon which such through routes shall be operated." 87

The duty exists to maintain through routes without undue discrimination and, should the carriers fail in the performance of that duty, the Commission has power to enforce it."

In pursuance of this power, aided by the additional power granted in the Panama Canal Act," the Commission has held that it could enforce through routes with a water carrier."

**§ 152. Discrimination by Charging More for a Shorter Than a Longer Haul—Old Law.**—Section four of the Act to

87. *Missouri & Illinois Coal Co. v. Illinois C. R. Co.*, 22 I. C. C. 39, 44, 45, 46, 49.

88. *Re Coal Rates on Stony Fork Branch*, 26 I. C. C. 168; *St. Louis, S. & P. R. Co. v. Peoria & P. U. Ry. Co.*, 26 I. C. C. 226.

89. *Post*, Sec. 377.

90. *Augusta & Savannah Steamboat Co. v. Ocean Steamship Co.*, 26 I. C. C. 380; *Decatur Nav. Co. v. L. & N. R. Co.*, 31 I. C. C. 281 and cases cited; *Port Huron & D. S. S. Co. v. P. R. Co.*, 35 I. C. C. 475. In discussing this question the author hereof in a report to the Commission adopted by it in *Baltimore & C. S. S. Co. v. A. C. L. R. R. Co.*, 49 I. C. C. 176, 180 said: "Regardless of what the defendants have done in making rates into the southeast, they are under a duty to make reasonable proportional rates to and from ports reached by them, and their defense in this case is based upon conditions which Congress intended to change by the

provision for proportional rates. Under defendants' system of rates there is a minimum of water haul and a maximum of rail haul. The full utilization of the water highways will tend to lessen car shortages and will make cheaper the transportation cost of many commodities of prime necessity. The rail carriers are entitled to a reasonable compensation for their haul between ports and interior points, but no more. Nor can the rail carriers by a refusal to publish proportional rates, or to join in through routes and joint rates, deprive interior points of the benefit of water transportation to and from the ports nearest to such points. That there are other reasonable water-and-rail routes furnishes no sufficient justification for a refusal to establish proportional rates which shall make available a route that will increase the water haul and lessen the rail haul, and thus decrease the cost of the total haul."

Regulate Commerce as originally enacted, known as the long-and-short-haul clause, prohibited carriers from charging or receiving a greater compensation from transportation of passengers or "like kind of property under substantially similar circumstances and conditions" for a shorter than for a longer distance over the same line, in the same direction, the shorter being included in the longer. The proviso of the section authorized the Commission, in special cases, after investigation, to permit a less charge for a longer than a shorter haul. The meaning of this proviso was first discussed by Judge Cooley, then chairman of the Commission, in *re* Petition of Louisville and Nashville Railroad Co. and Southern Ry. & S. S. Co., 1 I. C. C. 31, 57, 1 I. C. R. 278. The carriers, not knowing just what would be the construction of the section, thought it wise to appeal to the discretion granted by the Commission in the proviso. The proceedings before the Commission in the case cited, *supra*, are given at length in the Interstate Commerce Reports, vol. I. beginning at page 76.

The first case under this section to reach the Supreme Court is what is known as the Social Circle case.<sup>91</sup> In that case the first contention was that as the charge to Social Circle was made up, of the joint rate to Atlanta, the long haul, plus the local rate over an intrastate road from Atlanta to Social Circle, the whole of the local rate going to the state road, the shipment was not within the provisions of the Act to Regulate Commerce. This contention was held unsound, the court saying: "that when goods are shipped under a through bill of lading, from a point in one state to a point in another, and when such goods are received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce." Having held that the Georgia road was subject to the provision of the section, the court proceeded to define the power of the Commission, and to state the effect of its decision that the section had been violated. The court said:

<sup>91</sup> *Int. Com. Com. v. Cincinnati, 184, 40 L. Ed. 935, 16 Sup. Ct. 700. N. O. & T. P. Ry. Co., 162 U. S.*

"Subject, then, as we hold the Georgia Railroad Company is, under the facts found, to the provisions of the act to regulate commerce, in respect to its interstate freight, it follows, as we think, that it was within the jurisdiction of the Commission to consider whether the said company, in charging a higher rate for a shorter than a longer distance over the same line, in the same direction, the shorter being included within the longer distance, was or was not transporting property in transit between states, under 'substantially similar circumstances and conditions.'

"We do not say that, under no circumstances and conditions, would it be lawful, when engaged in the transportation of foreign freight, for a carrier to charge more for a shorter than a longer distance on its own line; but it is for the tribunal appointed to enforce the provisions of the statute, whether the Commission or the court, to consider whether the existing circumstances and conditions were or were not substantially similar."

§ 153. **Long and Short Haul—Old Law Continued—Definite Construction.**—In the *Troy Alabama case*," the Supreme Court held that competition between rival routes which affects rates must be considered in determining whether or not the circumstances and conditions were substantially similar under section four of the act, although such competition was not a pertinent fact in considering discrimination under section two. It was there said by Mr. Justice Shiras:

"We are unable to suppose that Congress intended, by the 4th section and the proviso thereto, to forbid the common carriers, in cases where circumstances and conditions are substantially dissimilar, from making different rates until and unless the Commission shall authorize them so to do, much less do we think that it was the intention of Congress that the decision of the Commission, if applied to, could not be reviewed by the courts. The provisions of section 16 of the act, which authorizes the court to 'proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in

equity but in such manner as to do justice in the premises, and to this end, such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition,' extend as well to an inquiry or proceeding under the 4th section as to those arising under the other sections of the act."

After reviewing the evidence, the order of the Commission was set aside. This decision put it in the power of rail carriers practically to destroy the force of section four. If competition of rival lines will relieve from the section, it is always possible for the line that reaches the longer distance point, and not the shorter, to make such competition as will release from the obligation of the statute the carrier that serves both points. This result was clearly pointed out by Mr. Justice Harlan in his dissenting opinion, in language as follows:

"I dissent from the opinion and judgment in this case. Taken in connection with other decisions defining the powers of the Interstate Commerce Commission, the present decision, it seems to me, goes far to make that Commission a useless body for all practical purposes, and to defeat many of the important objects designed to be accomplished by the various enactments of Congress relating to Interstate Commerce. The Commission was established to protect the public against the improper practices of transportation companies engaged in commerce among the several states. It has been left, it is true, with power to make reports, and to issue protests. But it has been shorn, by judicial interpretation, of authority to do any thing of an effective character. It is denied many of the powers which, in my judgment, were intended to be conferred upon it. Besides, the acts of Congress are now so construed as to place communities on the lines of interstate commerce at the mercy of competing railroad companies engaged in such commerce. The judgment in this case, if I do not misapprehend its scope and effect, proceeds upon the ground that railroad companies, when competitors for interstate business at certain points, may, in order to secure traffic for and at those points, establish rates that will enable them to accomplish that result, although such rates may discriminate against inter-

mediate points. Under such an interpretation of the statutes in question, they may well be regarded as recognizing the authority of competing railroad companies engaged in interstate commerce—when their interests will be subserved thereby—to build up favored centers of population at the expense of the business of the country at large. I cannot believe that Congress intended any such result, nor do I think that its enactments, properly interpreted, would lead to such a result.”

It would seem that the dissenting opinion of Mr. Justice Harlan, *supra*, more nearly applied the legislative intent than that arrived at by the majority of the court. But it should be remembered that, as has been said by the Supreme Court, the act to regulate commerce was experimental, and its purpose was not to prevent, but promote, competition. Competition of markets is a force that carriers cannot disregard, it affects all transportation to a greater or less extent. As said by Arthur T. Hadley, *Railroad Transportation*, p. 65: “The wheat of Dakota, the wheat of Russia, and the wheat of India come into direct competition. The supply at Odessa is an element in determining the price at Chicago. \* \* \* Cabbages from Germany contend with cabbages from Missouri in the markets of New York.” Nor does this lower rate to the competitive point injure the non-competitive point, so long as there is any profit in the competitive rate. This point is clearly pointed out in the *LaGrange* case.” The higher rate for the local haul is sometimes necessary in order that a community may have railroad transportation. To quote again from Hadley’s *Railroad Transportation*, at p. 115:

“Suppose it is a question whether a road can be built through a country district, lying between two large cities, which have the benefit of water communication, while the intervening district has not. The rate between these points must be made low to meet water competition; so low that if it were applied to the whole business of the road it would make it quite unprofitable. On the other hand, the local business at intermediate points is so small that this alone cannot support the road, no matter how low or how high the rates are made. So that, in order to live at all, the road must secure

two different things—the high rates for its local traffic, and the large traffic of the through points which can only be attracted by low rates. If the community is to have the road, it must permit the discrimination.”

The burden of proof to show dissimilarity in circumstances is on the carrier.” “Line” used in the statute means a physical line, not a mere business arrangement.”

§ 154. **Long and Short Haul Clause under Act 1910.**—Congress in 1910 for the first time since the passage of the Act to Regulate Commerce, amended the so-called Long and Short Haul Clause of the Act (Sec. 4). The Amendment struck out the words of the former law “under substantially similar circumstances and conditions,” but gave the Commission power, upon application and after investigation, to grant relief from the operation of the section as amended.”

Construing the Amended Act the Commission held it constitutional; held that its provisions granted the Commission power to determine how far relief should be extended, power to determine whether or not a wrong resulted from a particular application of rates and power to correct that wrong if found to exist. The history of the old and the new law was given and the conclusion reached that, while in determining what

Ed. 1047, 23 Sup. Ct. 687.

94. *Spartanburg Board of Trade v. Richmond & D. R. Co.*, 2 I. C. C. 304, 2 I. C. R. 193.

95. *Boston & A. R. Co. v. Boston & L. R. Co.*, 1 I. C. C. 158, 1 I. C. R. 500, 571; *Daniels v. Chicago, R. I. & P. R. Co.*, 6 I. C. C. 458, 476. For other cases discussing the subject see: *Railroad Com. of Georgia, Trammell et al. v. Clyde S. S. Co.*, 5 I. C. C. 324, 4 I. C. R. 120, 150; *Tex. & P. Ry. Co. v. Int. Com. Com.*, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666; *Parsons v. Chicago & N. W. Ry. Co.*, 167 U. S. 447, 42 L. Ed. 231, 17 Sup. Ct. 887; *Int. Com. Com. v. Detroit, G. H. & M. Ry. Co.*, 167

U. S. 633, 42 L. Ed. 306, 17 Sup. Ct. 986; *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. 209; *East Tenn., Va. & Ga. Ry. Co. v. Int. Com. Com.*, 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. 516. See also *Int. Com. Com. v. Clyde S. S. Co.*, 181 U. S. 29, 45 L. Ed. 729, 21 Sup. Ct. 512; *Brewer v. Central of Ga. R. Co.*, 84 Fed. 258; *Int. Com. Com. v. Western & A. R. Co.*, 88 Fed. 186.

96. Sec. 348, *post*. Also old and new law contrasted, *Atchison, T. & S. F. Ry. Co. v. United States*, 191 Fed. 856, 857, and *Railroad Com. of Nev. v. So. Pac. Co.*, 21 I. C. C. 329, 332, 333.

relief should be granted under the power conferred by the proviso, the Commission could not act arbitrarily, but must apply the principles controlling in administering other portions of the Act. Applying this conclusion to transcontinental transportation, the Commission divided the United States into zones and fixed a rate percentage between the different zones." Suit being filed in the Commerce Court, that court enjoined the order of the Commissions." An appeal being taken to the Supreme Court, that court reversed the Commerce Court and sustained the validity of the statute, thus leaving in force the orders of the Commission."

The right primarily to determine for themselves the existence of circumstances as a basis of charging higher rates for shorter than for longer distances, was taken from the carriers and vested in the Commission by the amendment of 1910. This fact was stated by the Supreme Court, following which statement it was said:" "This results from the fact that by the amendment in question the original power to determine the existence of the conditions justifying the greater charge for a shorter than was exacted for a longer distance, was taken from the carriers and primarily vested in the Interstate Commerce Commission, and for the purpose of making the prohibition efficacious it was enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted."

§ 154A. **Long and Short Haul Clause Under Act 1920.**—For years there have been advocates of a provision which would

97. *Railroad Com. of Nevada v. Southern Pac. Co.*, 21 I. C. C. 229; *City of Spokane v. Northern Pac. Ry. Co.*, 21 I. C. C. 400.

98. *Atchison, T. & S. F. Ry. Co. v. United States*, 191 Fed. 856.

99. *United States v. Atchison, T. & S. F. Ry. Co.*, 234 U. S. 476, 58 L. Ed. 1408, 34 Sup. Ct. 986, reversing *Atchison, T. & S. F. Ry. Co. v. United States*, 191 Fed. 856, *supra*, and sustaining order of the Commission in 21 I. C.

C. 329 and 400, *supra*, Opinions Commerce Court Nos. 50, 51, p. 229—"Intermountain Case").

100. *United States v. L. & N. R. Co.*, 235 U. S. 314, 59 L. Ed. 245, 35 Sup. Ct. 113, citing *Intermountain Case*, note, *supra*. *Louisville & N. R. Co. v. United States* 245 U. S. 463, 62 L. Ed. 400, 38 Sup. Ct. 141; *United States v. Merchants & M. Traffic Assn.*, 242 U. S. 178, 61 L. Ed. 233, 37 Sup. Ct. 24.

unqualifiedly prohibit a greater charge for a shorter haul over the same line in the same direction. The amendment of 1920 is a compromise between such advocates and those who were satisfied with the amendment of 1910. The quotation concluding section 154 above is ample authority to sustain the validity of the 1920 amendment. Such amendment grants no further power to the Commission, but restricts the power which it had under the former law.<sup>101</sup>

§ 155. **Fourth Section—Relation between Through Rates and Intermediate Rates.**—That through rates should not exceed the sum of the local rates and that *prima facie* the through rates should be less than the aggregate of the locals, were general principles announced and applied by the Commission prior to the Act of 1910. The amendment contained in that Act made it illegal for a carrier "to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of" the Act.<sup>102</sup>

The Commission has assumed to grant relief from this clause of the Fourth section as it has and was certainly authorized to do as to the provision relating to long and short hauls. The purpose of the Amendment was to fix one method of measuring rates and to prevent unjust discrimination. Obviously two or more hauls over intermediate lines should cost more than one haul over the same lines; therefore, to charge more for what costs less is unjust discrimination. The subject has been discussed *supra*, section 119, 120 and 121.

§ 156. **Discrimination between Carloads and Less than Carloads.**—A differential between carload and less than carload shipments is not prohibited by the Act to Regulate Commerce, and the Commission has said:<sup>103</sup> "It is a sound rule for carriers to adapt their classifications to the laws of trade. If an article moves in sufficient volume, and the demands of commerce will be better served, it is reasonable to give it a car load classification and rate. The car load is probably the only practicable unit of quantity." Whether or not there should be a differential and, if any, what, between carload and less

101. Sec. 349, *post*.

102. Sec. 200, *post*.

103. *Thurber v. New York C. &*

*H. R. R. Co.*, 3 I. C. C. R. 473,  
2 I. C. R. 742.

than carload depends upon the facts and circumstances of each particular case. One of the most important facts to be considered is the difference, if any, in the cost of service.

Noyes, in his excellent work on *American Railroad Rates*<sup>104</sup> says: "Shipments in car load lots furnish a large paying freight relative to dead weight, and smaller proportionate expense for loading and unloading, billing and collecting, than small shipments." The differential, like a rate, should be reasonable and should be fixed with a view to the just interests of all concerned and the adjustment of this difference rests primarily with the carriers<sup>105</sup> This principle has been very generally recognized by carriers.

The number of commodities taking car load classifications has materially increased.

This progressive recognition of the law that it is discrimination to charge for a less expensive movement the same as for a more expensive one, would seem to justify the hope that this form of discrimination may eventually be abolished. While the Commission has always shown reluctance to require the establishment of carload ratings, it has to prevent discrimination ordered carriers to make such a rating.<sup>106</sup> The question is discussed in sections 112, 113, and 116 *supra*, and there is a full review of the authorities in the *Taylor Dry Goods case*.<sup>107</sup>

§ 157. **Bulked Shipments.**—It has been held<sup>108</sup> in England that a railway company cannot legally charge a greater sum

104. Noyes, *American Railroad Rates*, 73.

105. *Business Men's League of St. Louis v. Atchison, T. & S. F. Ry. Co.*, 9 I. C. C. 318, 358, 359, 368; *California Com. Asso. v. Wells Fargo Ex. Co.*, 14 I. C. C. 422; *Scofield v. Lake S. & M. S. R. Co.*, 2 I. C. C. 90, 2 I. C. R. 67.

106. *Spokane v. N. P. R. Co.*, 19 I. C. C. 162.

107. *Taylor Dry Goods Co. v. M. P. Ry. Co.*, 28 I. C. C. 205. In the 1915 *Western Advance Rate Case*, 30 I. C. C. 497, 495; *Chicago Wool Co. v. C. M. & St. P.*

*Ry. Co.*, 40 I. C. C. 101; *South-eastern Cotton Goods* 43 I. C. C. 530, 536, and *Consolidated Classification Case*, 54 I. C. C. 8, the Commission continues its "progressive recognition" of the text of this section written in 1909. In *Wyeth Hdw. & Mfg. Co. v. A. T. & S. F. Ry. Co.*, 39 I. C. C. 697, 700, the Commission came near to a retrograde movement.

108. *Crouch v. G. N. R. Co.*, 11 Ex. 742, 25 L. J. Ex. 137, *Baxendale v. L. & S. W. Ry.*, 4 H. & C. 130, 35 L. J. Ex. 108, L. R. 1 Ex. 137, 12 Jur. (N. S.) 274, 14 L. T. 26, 14 W. R. 458.

for the carriage of a package containing several parcels belonging to different persons than for a package containing several parcels all belonging to one person. The English rule was held by the majority of the Commission, Mr. Commissioner Lane writing the opinion, to be the law in the United States.<sup>109</sup> From this rule Commissioners Knapp and Harlan dissented. The question coming before the circuit court, Circuit Judges Lacombe, Ward and Noyes adopted the dissenting opinion of Mr. Commissioner Knapp.<sup>110</sup> It is difficult to see what interest a carrier has in the question of whether or not the several packages constituting a carload of freight belong to one or more persons. When only one bill of lading is issued and only one person is dealt with, why should a carrier ask as to the title to the several parcels? Does not the rule announced by the court *supra* open an opportunity for illegal devices? Suppose a shipper claims he owns all the packages and they are billed to one consignee, it would in some cases, be impossible to prove that the shipper's statement was not true. In a case where a shipper concealed the true ownership he would get a carload rating, while the more honest shipper would pay the higher rate. Discrimination refers to the matter of carriage and character of the commodity, not to the question of title. If the shipments move the same way, with the same expense to the carrier, and are of like kind of traffic, it should make no difference whether the shipper is the real owner or only trustee for the real owners.

§ 158. **Carloads—Ownership of.**—The next preceding section taken from the first edition of this book was written prior to the decision of the Supreme Court in the Bulked Shipment case.<sup>111</sup> In that case, decided April 3, 1911, the rule announced in the text was stated to be the law. In the course of the opinion it was said:

109. *California Com. Asso. v. Wells Fargo Ex. Co.*, 14 I. C. C. 422; *Export Shipping Co. v. Wabash R. Co.*, 14 I. C. C. 437, and cases cited in the prevailing and dissenting opinions.

110. *Delaware, L. & W. R. Co. v.*

*Int. Com. Com.*, 166 Fed. 499.

111. *Int. Com. Com. v. Delaware, L. & W. R. Co.*, 220 U. S. 235, 252, 253, 55 L. Ed. 448, 31 Sup. Ct. 392. citing as construing the English Equality Clause, *Great Western R. Co. v. Sutton*, 1869—

"The contention that a carrier when goods are tendered to him for transportation can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers as to demonstrate the unsoundness of the proposition by its mere statement."

In giving the reason for the conclusion reached, the court said:

"Moreover, the unsoundness of the contention is demonstrated by authority. It is not open to question that the provisions of Section 2 of the Act to Regulate Commerce were substantially taken from Section 90 of the English Railway Clauses Consolidated Act of 1845, known as the Equality Clause."

The principle being thus established, is universally followed.

It has been held that in such shipments the forwarding agent is so far the agent of the shipper as to bind him by a contract for released rates.<sup>118</sup>

§ 159. **Train Loads.**—The usual course of business must be considered in determining questions of discrimination, and while there may be some basis in logic for the claim that a lower rate a car should be made on train loads than on carloads, in fact train loads are rarely used and such a unit of quantity would not be equitable or justified. This principle is well expressed by the Commission as follows:

"Whatever difference there may be in the cost to the carrier between traffic in train loads and traffic in carloads, it appears from the general course of legislation with respect to commerce between the states, from the debates and reports

L. R. 4, H. L. 226, 38 L. J. Ex. Manchester, etc., R. Co. 1885—11  
177, 22 L. T. 43, 18 W. R. 92; App. Cas. 97.  
Evershed v. London & N. W. 112. Great Northern Ry. Co. v.  
Ry. Co., 1878—33 App. Cas. 1029, O'Conner, 232 U. S. 508, 58 L.  
and Denaby Main Colliery Co. v. Ed. 703, 34 Sup. Ct. 330.

of the various committees in Congress when the Act to Regulate Interstate Commerce was under consideration, from the better considered court opinions, and from the reports and opinions of this Commission, that to give greater consideration to train-load traffic than to carload traffic would create preference in favor of large shippers and be to the prejudice of small shippers and the public."<sup>113</sup>

§ 160. **Classification of Commodities Should Be Without Discrimination.**—Classification of commodities, like any other act of the carrier affecting the rate to be charged, must be reasonable and such classification must be based on a real distinction.<sup>114</sup> Unless the distinction is real, it would violate section two of the interstate commerce act and discriminate between "like kinds of traffic." A uniform classification would be much better than the differences now existing in that respect and the Commission "has sought as far as practicable to secure the establishment throughout the country of a uniform classification of freight."<sup>115</sup> We have seen, section 90 ante, that low class traffic of prime utility and moving in large quantities demands a low rate. The principles of classification are so important and are so clearly stated by Prof. Henry C. Adams, former Statistician of the Interstate Commerce Commission,<sup>116</sup> that it is valuable to reproduce them here:

*"Principles underlying freight classifications.*—It was discovered early that the charges for transportation of different articles of freight could not be apportioned among such articles with regard alone to the cost of carriage. This basis of determining the charges, it was found, would confine to narrow limits the movement of different articles, whose bulk or weight was large in comparison to their value, while

113. *Anaconda Copper Mining Co. v. Chicago & E. R. Co.*, 19 I. C. C. 592, 596; *Carstens Packing Co. v. Oregon S. L. R. Co.*, 17 I. C. C. 324, 328. See also Sec. 116, *supra*; *Burlington C. R. & N. Ry. Co. v. Northwestern Fuel Co.*, 31 Fed. 652; *Paine Bros. v. Lehigh Valley R. Co.*, 7 I. C. C. 218.

114. *Stowe-Fuller Co. v. Pennsylvania Co.*, 12 I. C. C. R. 215, 220.

115. *Duluth Shingle Co. v. Duluth, etc., R. Co.*, 10 I. C. C. R. 489, 504.

116. *Railways in United States*, part 2, pp 14, 15.

heavier articles with less bulk would be made to pay disproportionately low rates.

“Under the system of apportioning the charges strictly to the cost, some kinds of commerce which have been very useful to the country and have a tendency to bring different sections into more intimate business and social relations could never have amounted to any considerable magnitude, and in some cases could not have existed at all, for the simple reason that the value at the place of delivery would not equal the purchase price with the transportation added. The traffic would thus be precluded, because the charge for carriage would be greater than it could bear. On the other hand, the rates for the carriage of articles which, with small bulk or weight, concentrated great value would, on that system of making them, be absurdly low when compared to the value of the articles, and perhaps not less so when the comparison was with the value of the service in transporting them.

“Accordingly, it was found not to be unjust to distribute the entire cost of service among all articles carried on a basis that gave greater consideration to the relative value of the service than to the cost. Such a method would be most beneficial to the country; it would enlarge commerce and extend communication, and would be better for the railroads because of the increased traffic which would be brought to them.

“The value of the article carried under this system would be the most important element in determining what freight charge it should bear. Other considerations, however, equally important must not be overlooked when the freight classification is to be made. The classifications as now constructed have for their foundation the following elements:

“The competitive element or the rates made necessary by competition.

“The volume of the business—that is, the tonnage movement.

“The direction in which the freight moves, that is, whether it moves in the direction in which most of the freight is transported or in the reverse direction in which empty cars are running.

“The value of the article.

“The bulk and weight.

“The degree of risk attending transportation.

“The facilities required for particular or special shipments.

“The conditions attending transportation, such as furnishing special equipment, as in the case of private dressed-beef cars or cars specially adapted for freight of a perishable nature, or cars of large size for freight of extraordinary bulk.

“Another condition which has also received consideration is the analogy which the new articles to be classified bear to other articles found in the classification.

“The conditions under which railroad companies can afford to transport traffic have a large influence in determining the classification.

“These are the general rules under which classifications are constructed, and while to a large extent controlling, the classifications are, notwithstanding, in a great measure a series of compromises, the participants in which are not alone the railroads, but also the shippers and representatives of business interests throughout the country, the latter being afforded ample opportunity to join with the railroads in the discussion as to the proper classification of articles of shipment affecting their interests.

“While the pressure for reductions is very strong from certain localities, concessions are not now so readily granted, as the territory covered by the freight classifications is so large that great care in the assignment of articles to particular classes must be taken in order to avoid working an injury to any particular section. The commercial and transportation interests are regarded as identical, and the welfare of the whole territory and all interests affected must be considered. It is, however, occasionally observed that particular localities are, to some extent, preferentially served by the action of carriers who resist proposed changes in the classification for the reason that, in their opinion, they will operate to the prejudice of certain patrons. Thus exceptions to the classification are created by a road continuing to carry some articles at one class, while, in the opinion of a majority of the roads using the classification, the articles could well stand a higher rating.”

§ 161. **Uniform Classification.**—Efforts to obtain uniformity in the classification of commodities have been made since the

date of the original Act to Regulate Commerce, and probably even before that date. Beginning at page 453 of volume 25 of the Interstate Commerce Commission Reports is given a history of these efforts since 1887. In the same case in which that history is given the Commission stated some principles which should be applied to all attempts to reach uniformity. Says the Commission: "The making of a freight classification is a great public function," and further: "No great reform like classification reform, which touches every interest in the country, can ever hope to be carried into effect without causing disturbances, annoyance, and opposition, and some injustice. It is therefore especially important that before a classification committee publishes new rules, descriptions, packing requirements, and ratings, full public hearings shall have previously been given after sufficient notice. It is not necessary to hear *everybody*. In making a classification that would mean endless repetition and interminable controversy without ever reaching a conclusion. Rather is it important to hear *everything*. In other words a body of experts in classification should hear and know everything and then form their conclusions." "

We now have three general classifications:

First. The official classification, which, speaking generally, applies north of the Ohio and Potomac Rivers and East of Chicago and Mississippi River.

Second. Southern classification, applying generally to the territory south of the Ohio and Potomac Rivers and east of the Mississippi River.

Third. The western classification, applying to that territory not included in the other two classifications.

Besides the three general classifications referred to there are classifications published by the railroad commissions of the States of Illinois, Iowa, Georgia, North Carolina and Florida, applying locally on shipments moving between points in those states. Between points in the State of Texas the western classification governs in connection with an exception

117. Re Western Classification, I. C. C. 554. See also Sections 25 I. C. C. 442, 450, 451, *et seq.*; 81, 81 A *ante*, and 160, *supra*.  
Western Trunk Line Rules, 34

sheet published by the railroad commission of that state. There is also a classification known as the New England Freight Classification, which governs the class rates between points on the eastern, western and northern divisions of the Boston and Maine Railroad.

Progress has been made towards uniformity of classification by the decisions in the Consolidated Classification case<sup>118</sup> and the Perishable Freight Investigation.<sup>119</sup> This uniformity should be reached separately from any question of the measure of rates. When the carriers seek so to change this classification as to raise rates, the fact that uniformity may also be accomplished will not justify an otherwise unjustified rate.<sup>120</sup>

§ 162. **Power of Commission over Classification.**—The Commission has the power to prohibit a classification that works a discrimination. This power was exercised by the Commission and a forcible and illustrative opinion written by Mr. Commissioner Knapp in *Procter & Gamble v. Cincinnati, H. & D. Ry. Co.*<sup>121</sup> This order of the Commission was enforced.<sup>122</sup> The Supreme Court, Mr. Justice White delivering the opinion, concluded the discussion of the question by saying:

“Whatever might be the rule by which to determine whether an order of the Commission was too general where the case with which the order dealt involved simply a discrimination as against an individual, or a discrimination or preference in favor of or against an individual or specific commodity or commodities or localities, or as applied to territory subject to different classifications, we think it is clear that the order made in this case was within the competency of the Commission, in view of the nature and character of the wrong found to have been committed and the redress which that

118. Consolidated Classification Case, all of Vol. 54 I. C. C.

119. Perishable Freight Investigation, 56 I. C. C. 449.

120. National Society of Record Assn. v. A. & R. R. Co., 40 I. C. C. 347, 356. Associated Railway Classification Exceptions 41 I. C. C. 561. Commodity rates may be

higher than class rates, although this is unusual. Sulphuric Acid from New Orleans, 42 I. C. C. 200, 202 and cases cited; Warren, Webster & Co., v. P. & Ry. Co., 38 I. C. C. 499.

121. *Procter & Gamble v. Cincinnati, H. & D. Ry. Co.*, 9 I. C. C. 440.

122. *Cincinnati H. & D. Ry. Co.*

wrong necessitated. Finding, as the Commission did, that the classification, by percentage of common soap in less than carload lots operating throughout official classification territory, brought about a general disturbance of the relations previously existing in that territory, and created discriminations and preferences among manufacturers and shippers of the commodity and between localities in such territory, we think the Commission was clearly within the authority conferred by the Act to Regulate Commerce in directing the carriers to cease and desist from further enforcing the classification operating such results."

The subject is one which involves so many facts that only the general principles come within the purview of this book. In a report of nearly two hundred pages the Commission has discussed the subject, cited illustrative decisions, given the history of efforts for uniform classification, and announced applicable principles."<sup>123</sup>

§ 163. **Milling in Transit.**—The Interstate Commerce Act in force prior to the amendment of June 29, 1906, was construed as giving the Commission no power to compel carriers to grant the privilege known as milling in transit."<sup>124</sup> This privilege is described and its legality discussed by Mr. Commissioner Prouty as follows:"<sup>125</sup>

"Generally in its application the raw material pays the local rate into the point of manufacture; when afterwards the manufactured product goes forward it is transported upon a rate which would be applicable to that product had it originated in its manufactured state at the point where the raw material was received for transportation, whatever has been paid into the mill being accounted for in this final adjustment. Under this or some equivalent arrangement at the present time grain of all kinds is milled and otherwise treated in transit; flour is blended, cotton is compressed, lumber is dressed and perhaps otherwise manufactured; live stock is stopped off to test the market.

v. Int. Com. Com., 206 U. S. 142,  
51 L. Ed. 995, 27 Sup. Ct. 648.

123. Re Western Classification,  
25 I. C. C. 442, 609. See also

Interior Iowa Cities Case, 28 I.  
C. C. 64.

124. Diamond Mills Co. v. Bos-  
ton & M. R. Co., 9 I. C. C. 311.

125. Central Yellow Pine Assn.

"It may be argued with much force that the Act to Regulate Commerce does not sanction arrangements of this kind and the Commission early in its history intimated that such might finally be its conclusion. *Crews v. Richmond & D. R. Co.*, 1 I. C. C. Rep. 401, 1 Inters. Com. Rep. 703. Such practices were, however, in use to a considerable extent at the time of the passage of the act and since then they have become universal. To abrogate these privileges would be to confiscate thousands and probably millions of dollars in value by rendering worthless industrial plants which have been constructed upon the faith of their continuation. Nor is it a forced construction of the statute to hold that when the product finally goes forward to the point of consumption it but completes the journey upon which is entered when the raw material was taken up. There can be no doubt that the application of this principle has cheapened the cost of transportation and probably of manufacture. The commission finally held, *In re Unlawful Rates in the Transportation of Cotton*, 8 I. C. C. Rep. 121, that cotton might be compressed in transit."

The Commission has said:<sup>126</sup>

"The stopping of a commodity in transit for the purpose of treatment or reconsignment is in the nature of a special privilege which the carrier may concede, but which the shipper cannot, in the present state of the law, demand as a matter of lawful right. Carriers may not, however, discriminate between markets nor between individuals in the granting of such privileges."

In the *Diamond Mills* case, *supra*, the Commission said: "A complete system of interstate railway regulation would probable give the regulating body authority to determine when privileges of this kind should be accorded, and upon what terms, for they all enter into and are really part of the rate."

The Hepburn amendment has given to the Commission the right and power to regulate these matters. Section one of the Act to Regulate Commerce as it now exists<sup>127</sup> provides:

*v. Vicksburg S. & P. R. Co.*, 10 I. C. C. 19, 213, 214.

126. *St. Louis Hay & Grain Co.*

*v. Mobile & O. R. Co.*, 11 I. C. C. R. 90, 101.

127. *post*, sec. 335.

"The term 'transportation' shall include \* \* \* all instruments and facilities of shipment or carriage \* \* \* and all services in connection with the receipt, delivery, elevation, and transfer in transit \* \* \* storage and handling of property transported," and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto. Under this amended law the Commission has required milling in transit to be extended so as to prevent discrimination.<sup>128</sup>

In the 1915 Western Rate Advance case,<sup>129</sup> it appeared that the grain rates then sought to be advanced were sufficiently high, that the flour rates which were the proportional or remainder of the through rates were too low. The carriers having offered their proof on the theory that the milling in transit privilege should continue, it was pointed out by the Commission that the owner of the grain who paid the high local rate to the mill or the market should not have his rates increased, because the remainder of the through rate was too low.

§ 164. **Rebilling.**—Rebilling is a privilege granted to certain markets and consists of the right to ship a commodity from the point where it is produced to a distributing market where the shipper may unload, sort and clean the commodity, thereafter shipping the same amount of the same kind of commodity to his customers, not at the local rate from the distributing point to the final destination but at the remainder of the through rate. Commissioner Prouty illustrated the practice at Kansas City as follows:<sup>130</sup>

"During the period covered by this investigation, which was from April 1st to July 7th, 1896, and for a considerable

128. Southern Illinois Miller's Assn. v. L. & N. R. Co., 23 I. C. C. 672, 678.

129. Western Rate Advance Case 1915, 35 I. C. C. 497; Nashville Flower Transit Rules, 41 I. C. C. 483, 490.

130. Re Alleged Unlawful Rates

and Practices in the Transportation of Grain, 7 I. C. C. 240, 241, 242, 247. See also Re Substitution of Tonnage at Transit Points, 18 I. C. C. 280. For a further definition see Cairo Board of Trade v. C. C. C. & St. L. Ry. Co., 46 I. C. C. 343, 348.

period prior thereto, the rate on corn from Kansas City to Chicago was 20 cents per 100 pounds. Hutchinson, Kansas, is a station upon the Santa Fe Railway, which runs from there through Kansas City to Chicago, Ill. The through rate from Hutchinson to Chicago was 25 cents, and the local rate from Hutchinson to Kansas City  $13\frac{1}{2}$  cents. A shipper from Hutchinson would forward a car load of corn to Kansas City and pay the local rate of  $13\frac{1}{2}$  cents. If afterwards he concluded to send this car load on to Chicago he might ship it by the Santa Fe Road, or by any other road between the two points, at the balance of the through rate from Hutchinson. The Chicago & Alton Railroad, for instance, would transport this car load of corn from Kansas City to Chicago, not for 20 cents per 100 pounds, but for  $11\frac{1}{2}$  cents. If the grain was sold at Kansas City, the purchaser succeeded to the right of sending it forward at the reduced rate.

"When the shipper shipped this car load of corn to Kansas City he had, as an ordinary thing, no idea or purpose as to its ultimate destination. It might be eaten in Kansas City; it might be sent to the Chicago market, or it might go to the Gulf; there was nothing upon any of the papers connected with its transportation to indicate what its destination beyond Kansas City was, or that it was destined to any point beyond, but if he did subsequently elect to ship it beyond Kansas City, the rate to any point he might select was the difference between the through rate from Hutchinson to the point of destination and the local rate which he had already paid from Hutchinson, and this rate was always different from the rate between Kansas City and the point of destination.

"The result, of course, was that nearly all grain was shipped into Kansas City upon a local bill of lading in the first instance and was afterward sent forward, if it finally went forward, upon a new bill of lading at the balance of the through rate. The difference between the through rate from the point of origin to the point of destination and the local rate from the point of origin to Kansas City was not the same in all cases, nor, indeed, in most cases, and consequently the balance of the through rate continually varied."

In the same case the practice was declared illegal and this rule was stated:

"An indispensable element in every through shipment would seem to be a contract for such through service; an agreement between the parties at the inception of the carriage that the freight shall be transported to the point of destination at the through rate."

Its disapproval of the practice was syndicated by the commission in the cases of *Mayor, etc., of Wichita v. Atchison, T. & S. F. Ry. Co.*, 9 I. C. C. 534, and *Cannon Falls Elevator Co. v. Chicago, etc., R. Co.*, 10 I. C. C. 650.

§ 165. **Rebilling—Found Illegal.**—In the *Duncan case*<sup>131</sup> the Commission, speaking through Mr. Commissioner Clements, describes the practice and states the conclusion of the Commission as follows:

"It is contended by defendants that rebilling or reshipping is on the same basis as milling in transit and similar privileges. There is no case before us in this case against milling in transit, but it appears from the record that the privilege of milling in transit is accorded uniformly throughout the southeastern territory and is in no sense applied to Nashville or any other particular point alone.

"We are not convinced that the circumstances and conditions under which the reshipping privilege is accorded at Nashville are so dissimilar from those obtained at the other points involved in this traffic as to justify giving it our sanction on that ground. However, there are other aspects independent of this which lead us to regard this privilege with disfavor.

"Illustrating the second feature of the complaint as to the alleged illegality of this privilege, the following example is given: A Nashville dealer buys 2 cars of grain, 1 at Memphis and 1 at Louisville. He pays, up to Nashville on a Memphis car, 11 cents per 100 pounds and on the Louisville car 10 cents. Should this Memphis car burn, after being put in the warehouse, or be sold at Nashville, he would have two expense bills and one car of grain. Should he sell a car at Atlanta, the Nashville merchant would naturally use the Memphis bill which shows a payment of 11 cents, paying the

131. *Duncan v. N. C. & St. L. Ry. Co.*, 16 I. C. C. 590.

balance of the through rate from Memphis to Atlanta of 9 cents. He has, therefore, shipped the Louisville car to Atlanta for a total of 19 cents, when the through rate from Louisville to Atlanta is 24 cents and the combination of locals 27 cents. It is further alleged that as considerable grain is consumed in Nashville there is always a surplus of expense bills which may be manipulated in order to secure a cheaper rate than that provided in the tariffs. In answer to this defendants say that the operation of the reshipping privilege, as described in this example, is limited by the fact that the Memphis car of grain is worth more to the dealer at Nashville than the St. Louis car, by reason of the difference in the freight rate, and, therefore, Memphis grain is not sold at Nashville proper, but is all reshipped to the southeast. It is to be noted that the tariffs of the carriers contain a rule which prohibits trading in expense bills, and it is hardly probable that such a rule would appear if the manipulation of expense bills is impossible, as contended by defendants.

"While this manipulation of expense bills may not be practiced to the extent apprehended by complainants, we may remark that prohibitions of law are not invariably directed against illegal acts because they may be numerous; a statute may be considered equally necessary by the legislature to prevent sporadic or isolated acts in contravention of public policy. A practice or privilege which permits the movement of a single shipment at less than the rate lawfully applicable to such movement is one which the commission has, under the law, no alternative but to condemn.

"In considering a practice at Kansas City similar to the one under consideration (Alleged Unlawful Rates and Practices, 7 I. C. C. 240), it was found that the practice of handling grain in connection with this privilege was manifestly open to many abuses. On several occasions the Commission has considered practices of a more or less similar nature and has uniformly regarded them with disfavor. In the case above referred to the finding was based upon the fact that the movement upon which the through rate was applied was in no essential sense a through movement, and we find the same to be true with respect to rebilling or reshipping at Nashville. The grain upon its arrival at Nashville loses its identity, and

in every respect may be regarded as a local shipment. There is hardly a single incident of a through shipment involved in the transaction—the bill of lading is local, the rate is local, and there is nothing upon paper connected with the transaction indicating that the grain is to be carried beyond Nashville. If it is the intention to carry it beyond, there is no present idea as to the point of destination.

“We are of the opinion that the reshipping or rebilling privilege and the application of rates thereunder obtaining at Nashville is an illegal device by means of which grain, grain products, and hay may be transported at less than the tariff rate applicable thereto; and further, that it gives to Nashville undue and illegal preference and advantage and subjects other points in the southeast to unjust and unreasonable prejudice and disadvantage.

§ 166. **Rebiling—Illegal Only When Unjustly Discriminatory**—Subsequently to its first opinion in the Duncan case, *supra*, the Commission in an investigation “did not \* \* \* condemn rebilling or reshipping as such,” and in a second opinion there was entered a finding and holding that the privilege there under discussion “constituted an unreasonable preference or advantage and undue and unreasonable prejudice and disadvantage in violation of section 3 of the act to regulate commerce.”<sup>132</sup>

The Supreme Court, reversing the Commerce Court, sustained the Commission's order in the second case, placing its conclusion more on section 4 than on section 3 of the Act, although section 3 was the section relied on by the shippers and in the opinion of the Commission.<sup>133</sup> Upon further hearing the Commission reiterated its order.<sup>134</sup> The Supreme

132. *Duncan v. N. C. & St. L. Ry. Co.*, 21 I. C. C. 186.

133. *United States v. L. & N. R. Co.*, 235 U. S. 314, 59 L. Ed. 245, 35 Sup. Ct. 113.

134. *Duncan v. N. C. & St. L. Ry. Co.*, 35 I. C. C. 477. For the further history of the case, see *Louisville & N. R. Co. v. United States*, 197 Fed. 58, Opinion Commerce Court No. 47, p. 173.

For same case on application for preliminary injunction, see *Nashville Grain Exchange v. United States*, 191 Fed. 37, Opinion Commerce Court No. 46, p. 165. On appeal to Supreme Court, see *United States v. L. & N. R. Co.*, 235 U. S. 314, 59 L. Ed. 245, 35 Sup. Ct. 113. *Nashville Grain Exch. v. U. S.* 234 Fed. 699.

Court has indicated that such practice is discriminatory, and that when shipments are made at the remainder of the through rate, carriers are estopped to say that such remainder is not a fair rate on all traffic. That court, speaking through Mr. Justice Brewer, said:<sup>135</sup>

“Under the guise of a rebilling rate, the Vicksburg merchant who dealt with this western road was given a rate of 3½ per cent on any grain that he might see fit to ship to Meridian. While it may be true that a local railway’s share of an interstate rate may not be a legitimate basis upon which a state railroad commission can establish and enforce a purely local rate, yet, whenever, under the guise or pretense of a rebilling rate, some merchants are given a low local rate, the Commission is justified in making that rate the rate for all. It is not bound to inquire whether it furnishes adequate return to the railway company, for the state may insist upon equality, to be enforced under the same conditions against all who perform a public or *quasi* public service.”

§ 167. **Rebiling. Conclusion.**—That rebilling offers opportunity for manipulation of expense bills cannot be doubted, although that fact is insufficient to show that the practice is illegal. The decision of the Supreme Court sustaining the second order in the Duncan case *supra*, compares a reshipping or rebilling rate with a local rate, and holds in effect that when such rates are so compared, the lower reshipping rate for the longer haul may result in a violation of the fourth section, where the local rate for the shorter haul is higher. That such might be the result is true. If there are no reasons why there should be a reshipping rate lower than a local rate, the reshipping rate by whatever name called may be in substance but a local rate. Properly considered, the opinion of the Supreme Court applies the well known principle that substance and not form should be the determining factor. Rebiling rates are not illegal per se, and such rates become unlawful only when they produce a discrimination prohibited by section 3 or when they are in substance local rates and

135. *Alabama & V. R. Co. v. U. S.* 496, 51 L. Ed. 298, 27 Sup. Railroad Com. of Mississippi, 203 Ct. 163.

violate section 4. The final opinion of the Commission in the Duncan case accords with this conclusion.

§ 168. **Payment of Elevator Allowances.**—Formerly carriers bringing grain from producing territory paid elevators, even warehouses and stores, allowances for elevating, sacking, grading and weighing grain. Such payments were first held to be lawful and later unlawful. The Supreme Court found them lawful when reasonable and free from discrimination.<sup>136</sup> The decision of the Supreme Court did not exclude the Commission from exercising its administrative functions nor from deciding that such allowances might be withdrawn by the carriers. After these decisions of the Supreme Court, in a case sustaining the right of the carriers to withdraw such elevator allowances as are not necessary incidents to the transportation, the Commission gave a history of the decisions, and reached the conclusion that where elevation is a necessary part of the transportation, the carriers cannot escape the obligation to perform or pay for the service, otherwise the service or payment therefor, may be withdrawn.<sup>137</sup>

Discrimination when it exists violates both sections two and three of the Act to Regulate Commerce.

There is a provision of section 15 of the Act to Regulate Commerce under which the owner of property transported who renders any service connected with the transportation or who furnishes any instrumentalities used therein, may be compensated therefor by the carriers. Applying this section, the Supreme Court has held that carriers may and must pay the owners of grain transported for elevating such grain. Of course the provisions of sections 1, 2 and 3 apply and the payments must be reasonable and free from undue or unreasonable preference or advantage.

136. *Re Allowance to Elevators by Union Pac. R. Co.*, 14 I. C. C. 315; *Traffic Bureau Merchants Exchange of St. Louis v. Chicago, B. & Q. R. Co.*, 14 I. C. C. 317, 331; See Sec. 404, *post*; *Int. Com. v. Dittenbaugh*, 222 U. S. 42, 56 L. Ed. 83, 32 Sup. Ct. 22, modifying decree in *Peavey & Co. v. Union Pac. R. Co.*, 176 Fed. 409;

*Union Pac. R. Co. v. Updike Grain Co.*, 222 U. S. 215, 56 L. Ed. 171, 32 Sup. Ct. 39, affirming same styled case, 178 Fed. 223, 101 C. C. A. 583.

137. *Grain Elevation Allowances at Kansas City*, 34 I. C. C. 442. Note also *Omaha Elevator Co. v. Union Pac. R. Co.*, 249 Fed. 827, 162 C. C. A. 61.

§ 169. **Transit Privileges—Generally.**—Ordinarily the through rate from point of origin to point of destination is less than the aggregate of the intermediate rates, the result of this generally applied rule is that jobbers and manufacturers at cities intermediate between the points of production and of consumption cannot compete with those located at the cities at or near to the points of consumption. That such competition may be made possible, transit rates have been accorded under which the commodity may be stopped at the intermediate point for cleaning, milling, sorting, manufacturing or otherwise treating. After such stoppage the same commodity, or the same kind of commodity, or the product of the commodity, may be transported to the farther destination at a rate less than the local rate. This difference between the remainder of the through rate or the transit rate being accorded because the commodity had paid a charge up to the intermediate point. The justification for this practice is commercial, and not based on cost of service, because it costs no more to move a commodity originating at a particular place than it costs to transport the same commodity which has received a prior transportation service. In speaking of the practice the Commission said:<sup>138</sup> "Transit in many cases is beneficial in its application. When it can be applied without discrimination it results in the diffusion of business, in giving to rival communities the relative advantages to which they are entitled, and which can be accorded them in no other way, and, generally speaking, in the application of lower transportation charges. The commercial operations of this country have in many instances grown upon the exercise of transit privileges and could have been developed in no other way. This Commission has never held that transit was to be condemned in so far as it was beneficial and could properly be applied."

There are possibilities of misusing the transit rates, these the Commission has sought to guard against. Rules have been announced and principles stated for the government of carriers in respect to transit. On this subject the Commission

<sup>138</sup>. Transportation of Wool, 171.  
Hides and Pelts, 23 I. C. C. 151,

has said:<sup>139</sup> "The business man who employs the transit privilege looks upon it as a useful and in many cases as an exceedingly profitable practice. Indeed, we recognize that in most instances transit is now a commercial necessity, because of its almost universal application and on account of the development which certain lines of business have taken entailing heavy investments. There is only one way to minimize violations of the law at transit points and that is by the adoption of unambiguous rules and the proper policing thereof to reduce the opportunity for such violations."

After shipments have moved to the point where later transit is permitted, the transit allowance cannot, in the absence of unlawful discrimination, be made retroactive.<sup>140</sup>

Reshipping rates, transit rates and proportional rates, all rest upon the same principle and are not illegal merely because local rates may be higher. When these special rates are accorded to one market they cannot lawfully be withheld from another.

Import and export rates are made on proportionals, and "a carrier may lawfully make an import rate from a port in the United States to an interior destination less than its domestic rate from the same port to the same destination," but different rates cannot be made on the proportional in the United States based upon the foreign port from which the traffic starts.<sup>141</sup>

§ 170. **Allowances to Tap Line Railroads.**—What are called tap lines were described by the Commission as follows:<sup>142</sup>

139. Transit Case, 24 I. C. C. 340, 349. See also Fabrication-in-Transit Charges, 29 I. C. C. 70; Re Substitution of Tonnage at Transit Points, 18 I. C. C. 280; Transit Case 25 I. C. C. 130, 26 I. C. C. 204; National Casket Co. v. Sou. Ry. Co., 31 I. C. C. 678.

140. Meeds Lumber Co. v. A. C. R. Co., 39 I. C. C. 337; Swift & Co. v. M. & O. R. Co., 39 I. C. C. 701; Interstate Packing Co. v. C. & N. W. Ry. Co., 42 I. C. C. 189; Freeman v. Sou. Ry. Co.,

42 I. C. C. 736; Burritts v. C. P. Ry. Co., 45 I. C. C. 195; Fargo Iron & Metal Co. v. G. N. Ry. Co., 46 I. C. C. 399; National Live Stock Exch. v. C. B. & Q. R. Co., 47 I. C. C. 380, 400, 401, 402.

141. Texas & P. Ry. Co. v. Int. Com. Com., 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666; New Orleans Board of Trade v. Illinois C. R. Co., 23 I. C. C. 465; Import and Domestic Rates—Clay, 39 I. C. C. 132.

142. Central Yellow Pine Assn.

"While these logging roads are almost or quite without exception mill propositions at the outset, built exclusively for the purpose of transporting logs to the mill, they soon reach a point where they engage in other business to a greater or less extent. As the length of the road increases, as the lumber is taken off and other operations obtain a foothold along the line, various commodities besides lumber are transported, and this business gradually develops until in several cases what was at first a logging road pure and simple has become a common carrier of miscellaneous freight and passengers. Almost all these lines, even where they are run as private enterprises, do more or less outside transportation, and it would be difficult to draw any line of demarkation between the logging road as such and the logging road which has become a general carrier of freight."

In many instances carriers paid divisions of the through rates to these tap lines, which allowances or divisions were usually for the benefit of the lumber manufacturing plant generally the owner of the tap line. This practice was described by the Supreme Court as follows:<sup>143</sup> "The railroads west of the Mississippi make a certain allowance to the mills which have 'logging roads'—that is, roads by which logs are hauled from the timber to the mills. This is called 'tap-line allowance or division.' \* \* \* The mills east of the river have logging roads also, but appellants make no allowance to them. \* \* \* There does not appear to be any reason for such allowance west of the Mississippi which does not apply east of that river, and it amounts to a rebate or reduction from the regularly published rate, and gives an advantage to the mills west of the Mississippi over those east, although the published rates from both are the same."

The Commission entered into a general investigation as to the character of tap lines and the legality of allowances thereto, after which it was determined that most of such allowances were unlawful, amounting in effect, when paid to a tap line owned by the manufacturing plant, to a departure from the lawful rate.<sup>144</sup>

v. V. S. & P. Ry. Co., 10 I. C. C. 206 U. S. 441, 444, 51 L. Ed. 1128,  
193, 199. 27 Sup. Ct. 700.

143. Illinois C. R. Co. v. I. C. C., 144. Tap Line Cases, 23 I. C. C.

The Supreme Court, referring to the fact that the transportation of lumber was excepted from the commodities clause<sup>144</sup> of the Commerce Act, reversed the Commission and held that if the tap line, although owned by the manufacturing plant was a common carrier the payment of a division thereto was not illegal. The Court also held that not the extent to which a railroad is used, but the right of the public to demand service of it, determined its character as a common carrier.<sup>145</sup> The holding of the Supreme Court does not deprive the Commission of the power to regulate tap lines participating in interstate commerce. As to rates, rules and practices, the Commission has power over these short lines to the same extent as over other common carriers subject to its jurisdiction.<sup>146</sup>

§ 171. **Allowances to Industrial Tracks.**—Except for the proviso of the Commodities clause which excepts from its provisions thereof "timber and the manufactured products thereof," the principles applicable to allowances to industrial railroads are similar to those applicable to divisions to tap line roads. In the first Industrial Railways case<sup>147</sup> the Commission said: "The allowances are made to the industries or to their subsidiary railways in the form of (a) divisions out of the rate, (b) per diem reclaims, (c) remission of demurrage and (d) furnace allowances." It was held that these various allowances depleted the revenues of the carriers and were generally unlawful. Following the decision of the Supreme Court in the tap line cases, the Commission modified its holding, saying:<sup>148</sup> "Since the Supreme Court decided the tap line

277, 549. *Kaul Lumber Co. v. C. of Ga. Ry. Co.*, 20 I. C. C. 450.

145. Sec. 343, *post*.

146. *Tap Line Cases*, 234 U. S. 1, 58 L. Ed. 1185, 34 Sup. Ct. 741.

147. *Tap Line Case*, 31 I. C. C. 490; *Joint Rates with Birmingham Southern R. Co.*, 32 I. C. C. 110; *Davis Bros. Lumber Co. v. C. R. I. & P. R. Co.*, 46 I. C. C. 501; *Wasteful Service by Tap Lines*, 53 I. C. C. 656; *New Orleans N. & N. Ry. Co. v. I. C. R. Co.*,

55 I. C. C. 113; *Ill. C. R. Co. v. Brooks-Scanlon Co.*, 241 Fed. 445, 154 C. C. A. 227.

148. *Industrial Railways Case*, 29 I. C. C. 212.

149. *Industrial Railways Case*, 32 I. C. C. 129, 131; and see *Manufacturer's Railway Case*, 32 I. C. C. 100; *General Electric Co. v. N. Y. C. & H. R. R. Co.*, 14 I. C. C. 237; *Solvay Process Co. v. D. L. & W. R. Co.*, 14 I. C. C. 246.

cases, we have given effect to the court's decision by fixing the maximum divisions of rates or switching allowances which the tap line roads may receive from the trunk line carriers. Since that time we have also decided *In re Joint Rates with the Birmingham Southern R. R. Co.*, 32 I. C. C. 110, and the *Manufacturers Railway Case*, 32 I. C. C. 100, giving effect in each instance, under the facts there found, to the principles announced by the Supreme Court. The *General Electric Company case*, *supra*, the *Solvay Process Company case*, *supra*, and the *Crane Iron Works case*, 17 I. C. C. 514, were decided upon the facts, circumstances, and conditions appearing in connection with each. Those cases, however, differed from the tap line cases and from the instant case in that in each of the former cases the industrial railway, or the industrial corporation which in fact owned it, sought to have us require the trunk line roads to accord the industrial roads allowances or divisions which the trunk line roads were unwilling to accord and which they contended would be unlawful."

The Supreme Court referred to the distinction drawn by the Commission between "allowances" and "absorptions" as "abstruse," and when applied to tap lines and industrial roads these words and "divisions" mean essentially the same thing.<sup>150</sup> By whatever name called they may not be prohibited by the Commission, they must be reasonable and free from unlawful discrimination and they could probably, when not included in the rates charged, be withdrawn by the carriers. Mr. Commissioner Harlan for years advocated plans under which many of the accessorial services performed or paid for by the carriers, would have been discontinued; or, if continued, paid for in addition to the regular rates. That, under the law, the carriers could adopt such plans is free from doubt. Whether the change should be made is an economic question. The Commission may not compel the adoption of the plans, but it can prevent unlawful discrimination and improper payments.<sup>151</sup>

150. *Manufacturers R. Co. v. United States*, 246 U. S. 457, 482; 62 L. Ed. 831, 844, 38 Sup. Ct. 383.

I. C. C. 578; *St. Louis Terminal Case*, 34 I. C. C. 453; *Second Industrial Railways Case*, 34 I. C. C. 596, and cases there cited; *Five*

**§ 172. Illegal for Carriers to Transport Commodities Produced or Owned by Them or in Which They Are Interested.—**

The ownership or control by carriers of a particular commodity gives such carriers an opportunity to transport such commodity and sell it at less than can its competitors who have no means of transportation and must pay the carrier to transport their commodity of like kind. The carrier can do this because it can forego some of the rate its competitor must pay and, therefore, undersell such competitor. This evil was prevalent and the Commission had sought to remedy it so far as it could with the limited power it had in this respect before the passage of the Hepburn amendment. Prior to the passage of the amendment containing this clause the Interstate Commerce Commission brought its bill seeking to enjoin a contract described in the allegation as follows:<sup>152</sup>

"In the spring of 1903 the Chesapeake & Ohio made a verbal agreement with the New Haven to sell to that road 60,000 tons of coal, to be carried from the Kanawha district to Newport News, and thence by water to Connecticut, for delivery to the buyer at \$2.75 per ton, and that a considerable portion had already been delivered and the remainder was in process of delivery. It was averred that the price of the coal at the mines where the Chesapeake & Ohio bought it, and the cost of transportation from Newport News to Connecticut, would aggregate \$2.47 per ton, thus leaving to the Chesapeake & Ohio only about 28 cents a ton for carrying the coal from the Kanawha district to Newport News, whilst the published tariff for like carriage from the same district was \$1.45 per ton."

Upon this allegation, the court formulated the question involved as follows:

"The question, therefore, to be decided is this: Has a carrier engaged in interstate commerce the power to contract and sell and transport in completion of the contract the commodity sold, when the price stipulated in the contract does

Per Cent Case 31 I. C. C. 351, 408, 409; Mitchell Coal & Coke Co. v. P. R. R. Co., 38 I. C. C. 40; Westport Stone Co., Second Industrial Case, 38 I. C. C. 316. National

Tube Co. v. Lake Ter. R. Co., 56 I. C. C. 272 and cases there cited. 152. New York, N. Y. & H. R. Co. v. Int. Com. Com., 200 U. S. 361, 50 L. Ed. 515, 26 Sup. Ct. 272.

not pay the cost of the purchase, the cost of delivery, and the published freight rates?"

The evils of carriers engaging in the purchase and sale of commodities transported by them were forcibly pointed out in the course of the opinion.

Cases were cited, and the conclusion was to direct the court below to issue a decree "perpetually enjoining the Chesapeake & Ohio from taking less than the rates fixed by its published tariff of freight rates, by means of dealing in the purchase and sale of coal."

§ 173. **Commodities Clause of Act 1906.**—It is obvious that the evils pointed out so forcibly by the Supreme Court apply equally where the carrier puts the ownership of the commodity in a corporation in which the carrier owns all the stock, and that the difference is only in degree and not in kind where the carrier has only a part of the stock in the corporation owning the commodity. Congress, by virtue of its plenary power to regulate interstate commerce, sought to prevent these evils, and the prohibition was made to apply where the carrier had an interest, direct or indirect, in the commodity transported. This clause the circuit court held unconstitutional, but the Supreme Court, upon appeal, held the provision valid<sup>153</sup> as construed. This construction is as follows:

"We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (a) When the article or commodity has been manufactured, mined or produced by a carrier or under its authority, and at the time of transportation the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; (b) When the carrier owns the article or commodity to be transported in whole or in part; (c) When the carrier at the time of transportation has an interest, direct or indirect, in a legal therefore, articles or commodities manufactured, mined, pro-

153. *United States v. Delaware* opinion of lower court, see 164 & H. Co., 213 U. S. 366, 415, 53 Fed. 215. L. Ed. 836, 29 Sup. Ct. 527. For

or equitable sense in the article or commodity, not including, produced or owned, etc., by a bona fide corporation in which the railroad company is a stockholder."

"In my judgment the act, reasonably and properly construed, according to its language, includes within its prohibitions a railroad company transporting coal, if, at the time, it is the owner, legally or equitably, of stock—certainly, if it owns a majority or all the stock—in the company which mined, manufactured or produced, and then owns, the coal which is being transported by such railroad company. Any other view of the act will enable the transporting railroad company, by one device or another, to defeat altogether the purposes which Congress had in view, which was to divorce, in a real, substantial sense, production and transportation, and thereby to prevent the transporting company from doing injustice to other owners of coal."

In construing the clause when brought before it the second time the Supreme Court held that when the carrier so exercised its power as a stockholder in a corporation owning the commodity as to deprive such corporation of actual independent existence, the commodities so owned were within the prohibition of the law.<sup>154</sup>

When a carrier organized a coal company to which its coal properties were leased and, although the stock of the company so organized was not owned by the carrier, such company was in substance controlled by the carrier, it was held that the commodities clause was violated.<sup>155</sup>

**§ 174. Cars Must Be Furnished Without Discrimination.**—Transportation includes in its meaning "cars," and section one of the Act provides: "Cars shall be furnished irrespective of ownership or any contract, express or implied, for the use thereof."<sup>156</sup> It, therefore, is the duty of the carriers subject to the Act to furnish cars without any unlawful preference.

In the *Pitcairn Coal* case,<sup>157</sup> the Circuit Court of Appeals

154. *United States v. Lehigh Valley R. Co.*, 220 U. S. 257, 55 L. Ed. 458, 31 Sup. Ct. 387.

155. *post*, Sec. 343, U. S. v. *Dela-ware, L. & W. R. Co.*, 238 U. S. 516, 59 L. Ed. 1438, 35 Sup. Ct.

873. For further history of the litigation relating to this clause, see U. S. v. *L. V. R. Co.*, 225 Fed. 399.

156. *Post*, Sec. 337.

157. *United States ex rel. Pit-*

prescribed rules for coal car distribution. The Supreme Court, however, held that the courts had no jurisdiction prior to action by the Interstate Commerce Commission, and the lower court was reversed. The Supreme Court said:

"The distribution to shippers of coal cars including those owned by the shippers and those used by the carrier for its own fuel is a matter involving preference and discrimination and within the competency of the Interstate Commerce Commission, and the courts cannot interfere with regulations in regard to such discriminations until after action thereon by the commission."<sup>158</sup>

In the *Morrisdale Coal Co.* case, cited note *supra*, it was contended that "all cars in the district should be distributed according to the capacity of the mine, without deducting private cars, foreign fuel cars, or the carrier's own fuel cars." Answering this contention, the Supreme Court said: "Whether this should be done as a general rule, or under the peculiar conditions prevailing on defendant's road at that time, was, as we have seen, an administrative question, and to be decided by the Commission as preliminary to the right to maintain this suit."

While the question of the reasonableness of a rule for the distribution of cars is an administrative one over which, when interstate commerce is involved, the Commission alone has primary jurisdiction, the courts, state or federal, have jurisdiction to determine whether or not a plaintiff has been damaged by the failure of a carrier to furnish cars "upon the basis of the carrier's own rule of distribution."<sup>159</sup> In other words, what is a reasonable rule is for determination by the Commission; whether or not an established rule has been violated with resulting damage is a judicial question within the purview of the courts.

*cairn Coal Co. v. Baltimore & O. R. Co.*, 165 Fed. 113.

158. *Baltimore & O. R. Co. v. United States*, 215 U. S. 481, 54 L. Ed. 292, 30 Sup. Ct. 164. The same ruling was made in *Int. Com. Com. v. Illinois C. R. Co.*, 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. 155; *Morrisdale Coal*

*Co. v. Pennsylvania R. Co.*, 230 U. S. 304, 57 L. Ed. 1474, 33 Sup. Ct. 938.

159. *Penn. R. Co. v. Puritan Coal Co.*, 237 U. S. 121, 59 L. Ed. 867, 35 Sup. Ct. 484; affirming same styled case, 237 Pa. 420, 85 Atl. 426, Ann. Cas. 1914B, 37.

A state statute requiring a railroad corporation to furnish cars within a reasonable time after they are required, recognized that "a reasonable time in any case would depend upon all the circumstances and conditions existing, including the requirements of the interstate commerce carried on by the corporation," was held valid by the Supreme Court in a suit originally brought in a state court, in which court plaintiff made no attack whatever upon the carrier's rules for car distribution.<sup>160</sup>

The Commission in a decision rendered prior to the court's decision in the Mullberry Coal case (note *supra*), said:<sup>161</sup> "It is the duty of carriers to furnish cars suitable to transport in safety traffic which they hold themselves out to carry."

The claim of exclusive jurisdiction made in that case is probably too broad a claim, although there is little doubt that the Commission has concurrent jurisdiction with the courts in cases where there is a refusal upon reasonable request to furnish cars for interstate transportation. "Cars must be furnished" is the language of the statute, and for any violation of the statute the shipper may recover damages. If the claim presents an administrative question, the Commission alone has jurisdiction. If no administrative question is presented, the "person or persons claiming to be damaged \* \* \* may either make complaint to the Commission \* \* \* or may bring suit \* \* \* in any district or circuit court of the United States," or under the reservation of section 22, in any state court of competent jurisdiction.<sup>162</sup>

The Commission may not, however, require carriers to furnish a tank car, as the words "cars," "transportation" and "practices" alone nor all together used in the Interstate Commerce Act do not confer such power.<sup>163</sup> The "car service" provision of the Act of May 29, 1917, as reenacted and

160. Illinois C. R. Co. v. Mullberry Hill Coal Co., 238 U. S. 275, 59 L. Ed. 1306, 35 Sup. Ct. 760; affirming same styled case 257 Ill. 80, 100 N. E. 151.

161. Vulcan Coal & Mining Co. v. I. C. C. Co., 33 I. C. C. 52, 64.

162. Secs. 8, 9 and 22 of the Act. Secs. 382, 383 and 443, *post*.

Florida Citrus Exchange v. A. C. L. R. Co., 39 I. C. C. 325, 326; Farmers Elevator Co. v. C. M. & St. P. Ry. Co., 47 I. C. C. 475; Menasha Paper Co. v. C. & N. W. Ry. Co., 241 U. S. 55, 60 L. Ed. 885, 36 Sup. Ct. 501.

163. United States v. P. R. Co.,

amended by the Transportation Act 1920 provides how cars shall be distributed and used, but does not attempt to compel carriers to furnish special types of cars.<sup>144</sup>

§ 175. **Same Subject—Principles Applied by the Commission.**—It being within the administrative functions of the Interstate Commerce Commission to determine whether or not a particular distribution violates the law, the same question is presented as in other cases of discrimination. In determining the question as to coal cars the Commission has accepted and applied certain general rules. Obviously one coal mine may need and be entitled to more cars than another. This fact makes necessary the rating of mines. This rating can be made by determining the physical and commercial capacity of the mine. Clearly to consider only physical capacity would be unjust, as that capacity might not be even approximately reached. How this physical capacity has been determined was described by the Commission as follows:

“The physical capacity is determined by the thickness of the coal seam, the number of rooms or working places, the capacity of the underground tram tracks, and the facilities for getting the coal out of the mine into the tippie, and from the tippie into the cars. A fixed per diem value is assigned to a man’s labor, taking into consideration the character of the seam upon which the work is to be done; and the number of places in which a man can work is taken into account regardless of the number who were actually employed.

The method of determining the commercial capacity was described by the Commission as follows:

“The commercial capacity, or the requirements of a mine for cars as tested by its actual shipments, is arrived at by taking the volume of the shipments made by a mine during a period of free-car supply, usually of four months and generally from April 1 to August 1, in each of the two preceding years. The three figures expressed in coal tons, namely, the physical capacity, the commercial capacity for the first year,

242 U. S. 208, 61 L. Ed. 251, 37  
Sup. Ct. 95, 227 Fed. 911.

164. Sec. 344A to F, *post*.

165. Rail & River Coal Co. v.  
Baltimore & O. R. Co., 14 I. C. C.  
86, 93, 94.

and the commercial capacity for the second year, are added together and the sum is divided by three.”<sup>166</sup>

In the Hillsdale Coal & Coke Co. case, *supra*, speaking of the methods of rating by thus determining the physical and commercial capacity of the mines, the Commission said:

“After a careful consideration of the system as applied to interstate shipments, we are inclined to think \* \* \* that a method of rating coal mines based upon a combination of their physical and commercial capacities more closely approximates their actual car requirements than a system based upon physical capacity only.”

The Commission in the Hillsdale case, *supra*, in summing up the principles adopted in previous cases, said:

“The general status of the question before the Commission may be readily ascertained by an examination of our decisions in one or two formal proceedings since the passage of the so-called Hepburn Act. In *Railroad Commission of Ohio v. H. V. Ry. Co.*, 12 I. C. C. Rep. 398, we held that while a carrier during periods of car shortage might not assign privately owned cars to operators other than their own owners, and might not assign foreign railway fuel cars to any mines except those to which they had been manifested by the foreign lines, it must nevertheless count all such cars against the distributive share of the respective mines to which the private cars belonged or to which the foreign railway fuel cars had been consigned; and in case the private cars or foreign railway fuel cars so delivered to a mine were not sufficient to fill out its distributive share of available coal cars, it should have in addition only so many of the system cars of the carrier as might be necessary, when added to the private or foreign railway fuel cars so received by it, to make up its full ratable proportion to the total available coal cars of all classes. We also held that all foreign railway fuel cars consigned to a particular operator, and all private cars owned by a particular operator, must be delivered to that operator, even though their number might exceed the ratable proportion of the particular mine in the distribution of available cars.”

166. *Hillside Coal & Coke Co. v. Pennsylvania R. Co.*, 19 I. C. C. 356, 359, 360.

These general principles were held by the Supreme Court to be such as the Commission might legally apply.<sup>167</sup> but that court in the *Morrisdale Coal Co. case*, *supra*, summed up the Commission's cases by saying:

"It was, however, recognized that there could be no hard and fast rule, and that circumstances might arise which would otherwise warrant a departure so as to enable the carrier to meet emergencies arising from a strike on its road, or embargoes by connecting lines."

The duty to furnish cars, a facility of transportation, without undue discrimination or unjust preference, applies, of course, to all kinds of traffic moved by the carriers.<sup>168</sup>

167. *Int. Com. Com. v. Illinois C. R. Co.*, 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. 155; *Int. Com. Com. v. Chicago & A. R. Co.*, 215 U. S. 479, 54 L. Ed. 291, 30 Sup. Ct. 163. For cases of the Commission discussing the general question see: *Richmond Elevator Co. v. Pere Marquette R. Co.*, 10 I. C. C. 629, 636, 637; *Galloway v. Cincinnati, H. & D. R. Co.*, 11 I. C. C. 1; *Parks v. Cincinnati & M. V. R. Co.*, 10 I. C. C. 47; *Thompson v. Pennsylvania R. Co.*, 10 I. C. C. 640; *Hawkins v. Wheeling & L. E. R. Co.*, 9 I. C. C. 212; *Glade Coal Co. v. Baltimore & O. R. Co.*, 10 I. C. C. 226, and cases there cited and discussed; *Powhatan Coal & Coke Co. v. Norfolk & W. Ry. Co.*, 13 I. C. C. 69; *Traer v. Chicago & A. R. Co.*, 13 I. C. C. 451; *Jacoby v. Pennsylvania R. Co.*, 19 I. C. C. 392; *Bulah Coal Co. v. Pennsylvania R. Co.*, 20 I. C. C. 52; *Re Coal Rates Stony Fork Branch*, 26 I. C. C. 168. For other than Commission cases see: *Logan Coal Co. v. Pennsylvania R. Co.*, 154 Fed. 497; *United States ex rel.*

*Coffman v. Norfolk & W. Ry. Co. (C. C.)*, 109 Fed. 831; *United States ex rel. Kingwood Coal Co. v. West Virginia & N. R. R. Co. (C. C.)* 125 Fed. 252; *West Virginia & N. R. Co. v. United States ex rel. Kingwood Coal Co.*, 134 Fed. 198, 67 C. C. A. 220; *United States ex rel. Greenbrier Coal & Coke Co. v. Norfolk & W. Ry. Co.*, 143 Fed. 266, 74 C. C. A. 404; *State ex rel. v. Cincinnati, N. O. & T. P. Ry. Co.*, 47 Ohio St. 130, 23 N. E. 928; *United States ex rel. Pitcairn Coal Co. v. Baltimore & O. R. Co.*, 154 Fed. 108; *Illinois Cent. R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275, 59 L. Ed. 1306, 35 Sup. Ct. 760; *Vulcan Coal Mining Co. v. I. C. R. Co.*, 33 I. C. C., 52 and cases cited. *Pennsylvania Paraffine Works v. P. R. Co.*, 34 I. C. C., 179. The Supreme Court failed to sustain the Commission in the two last cited cases. See note 163, *supra*.

168. *Re Advance Rates on Potatoes*, 25 I. C. C. 159, 169; *Galveston Commercial Assn. v. Atchison, T. & S. F. Ry. Co.*, 25 I. C. C. 216, 228.

§ 176. **Freight Charges Must be Collected Without Discrimination.**—One, if not the principal, purpose of the Act to Regulate Commerce being to prevent every form of discrimination, favoritism and inequality,<sup>169</sup> and it being the purpose of Congress "that all shippers should be treated alike," and the intention of the Act being "to prohibit any and all means that might be resorted to obtain or receive concessions and rebates from the fixed rates duly posted and published,"<sup>170</sup> it would seem to be clear that a carrier should not extend to one shipper a credit and refuse another shipper in like situation the same extension. It would seem to be equally clear that whatever privilege was extended must be stated in the published tariffs.<sup>171</sup>

177. **Right of Carrier to Route Shipments beyond Its Own Terminus.**—In the absence of a contract specifying the routing, the carrier may route freight passing beyond its own lines over any other reasonably convenient line. If there is a contract on the subject, or if the shipper gives instructions, the carrier must of course, comply therewith. In the absence of instructions, the carrier should route by the most direct and cheapest route.<sup>172</sup> There was nothing in the Act to Regulate Commerce before the Amendment of June 29, 1906, that would make illegal a contract by which an initial carrier reserved to itself, as a condition of guaranteeing the through rates, the right of routing the shipment beyond its own line as it might determine.<sup>173</sup> The Hepburn Amendment, not prohibiting such right nor specifically granting the power to the

169. *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. Ed. 297, 31 Sup. Ct. 265.

170. *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. 428; *Mohassuck Valley Railroad Case*, 37 I. C. C. 566; *Northampton & Bath Railroad Case*, 41 I. C. C. 68, 72; *Hocking Valley Ry. Co. v. United States*, 210 Fed. 735.

171. So held in the *United States v. Hocking Valley R. Co.*, 194 Fed. 234. See *Gamble-Robinson Com. Co. v. Chicago & N. W.*

*Ry. Co.*, 168 Fed. 161, 94 C. C. A. 217, 21 L. R. A. (N. S.) 982, 16 Ann. Cas. 613; *United States v. Erie R. Co.*, 209 Fed. 283. Transportation Act 1920, *post* Section 346A requires Carriers to collect freight charges before delivering the freight.

172. *Dewey Bros. Co. v. Baltimore & O. R. Co.*, 11 I. C. C. 481; *Hennepin Paper Co. v. Northern Pac. R. Co.*, 12 I. C. C. 535.

173. *Southern Pac. Co. v. Int. Com. Com.*, 200 U. S. 536, 50 L. Ed. 585, 26 Sup. Ct. 330.

Commission to prohibit same, the carrier may yet exercise the right, provided, of course, no undue or unjust discrimination results to shippers thereby. The Commission now has the power to establish through routes and joint rates.

The 1920 Amendment gives the Commission power over routing,<sup>174</sup> and provides for the recovery of damages for diverting shipments contrary to routing instructions.<sup>175</sup>

§ 178. **Discrimination in Billing.**—An unjust discrimination may be committed by billing one commodity under a classification to which it does not belong, by giving it a false weight or value, and by letting one commodity go at the net weight and denying that privilege to a like kind of traffic. This species of discrimination and other like devices and means are prohibited by section 10 of the Act to Regulate Commerce (see *post*, § 384.) The prohibition of the statute applies to the shipper as well as the carrier. The net weight practice was in effect a rebate,<sup>176</sup> as is the other practices mentioned, all of which are but devices violating the Act, and subjecting those who are guilty to punishment. The offense is committed when the goods are billed.<sup>177</sup> A shipper who, by misrepresentation, obtains a lower classification and rate than he is entitled to, is liable to the carrier for the difference between the rate paid, and the rate he should have paid under a proper billing.<sup>178</sup> One who in good faith by mistake incorrectly describes the goods is not subject to the penal provision of the Act.<sup>179</sup>

§ 179. **Tariffs of Rates Must Be Printed, Posted and Maintained.**—No carrier can engage in interstate transportation of goods “unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published.” The act requires not only the filing and publishing of such “rates, fares and charges,” but demands that the

174. Sec. 344g, *post*.

175. Sec. 401, *post*.

vGalley 155. 26367. Templeton.

176. Procter & Gamble v. Cincinnati, H. & D. R. Co., 9 I. C. C. 440, 484.

177. Davis v. United States, 104 Fed. 136, 43 C. C. A. 448.

178. Missouri, K & T. R. Co. v. Trinity Lumber Co., 1 Tex. Civ. App. 553, 21 S. W. 290.

179. Atchison, T. & S. F. Ry. Co. v. Goetz, 51 Ill. App. 151; Davis v. Pere Marquette R. Co., 10 I. C. C. 105.

published tariffs must be charged and collected. (See *post*, §§ 358, 364). No change in the tariff can be made without reasonable notice. No provisions of the Act are more effective to prevent discrimination and promote equality than are these. The courts and the Commission have sustained and enforced these provisions. It has sometimes been contended that they are unjust when applied to import or export traffic. It is true that such provisions would be inapplicable to purely water traffic. It is little or no more expensive for a ship to carry her full, than it is to carry her minimum cargo. For this reason, as a ship's sailing day approaches and her cargo has not been obtained, she does and should be allowed to reduce her rates, thereby obtaining her full load. This principle, however, does not apply to that part of a through export or import movement that is had over rail carriers. Ships, as well as individuals, are entitled to know what the land movement will cost and have this cost based upon equality of charge. There is nothing in the law that makes the rail carrier transport its domestic freight at the same rate as its proportion of an import or export movement.<sup>180</sup> On this subject the Commission, in its twenty-second annual report, pp. 14 and 15, says:

"Effective April 15, 1908, and in exact harmony with the decision of the Commission in the case of *Cosmopolitan Shipping Company v. Hamburg-American Packet Company et al.*, 13 I. C. C. Rep., 266, a regulation was promulgated by the Commission requiring that tariffs applying on traffic exported to or imported from foreign countries not adjacent to the United States must show the rates, fares, and charges of the inland carriers subject to the act for such transportation to the port and from the port in the United States, and that such rates, fares, and charges be so stated as to be available for all persons who desire to use them. It was provided that as a matter of convenience to the public such tariffs might show through rates to or from foreign points, but that if so prepared they should also show the inland rate or fare of the carrier subject to the act.

180. *Tex. & Pac. Ry. Co. v. Int.* Ed. 940, 16 Sup. Ct. 666.  
*Com. Com.*, 162 U. S. 197, 40 L.

“Representations were made to the Commission that transcontinental rail carriers reaching our Pacific coast ports were, on account of the long rail haul, at a disadvantage in competition with other carriers serving Atlantic ports and transporting Asiatic traffic via the Suez Canal route. They therefore requested modification of the requirements as to notice of changes in rates, and were given permission to make changes in their rates, applicable to such import and export traffic to or from our Pacific coast ports upon notice of three days of reduction in rates and of ten days as to advance in rates. Subsequently, by supplemental order, the same permission was extended to carriers subject to the act reaching Pacific coast ports in British Columbia.

“The rail carriers in the United States ordinarily known as the transcontinental lines withdrew, effective November 1, 1908, all their through import and export rates via the Pacific ports and applied to the inland carriage of export and import traffic through those ports the domestic rates applicable on traffic to and from the ports proper. The Canadian Pacific Railway, in connection with a large number of carriers in the United States with lines east of the Mississippi River, published and filed proportional class and commodity inland rates applicable to Vancouver, British Columbia, on traffic destined to oriental ports, the Philippines, Australia, and New Zealand, which proportional rates are much lower than the domestic rates applying on traffic destined to Vancouver proper. These tariffs, as permitted by the Commission’s rule foreign ports in connection with certain named steamship lines.

“The rule of the Commission was freely commented upon and for the information of shippers, show through rates to in the newspapers, but almost without exception from an entirely erroneous standpoint and a total misunderstanding or misconception as to what the rule required. No opinion was expressed by the Commission that the inland portion of export and import rates might not reasonably and properly be less than the domestic rates to the ports. The order simply required the carriers to conform to the plain requirements of the law and to publish, in the manner prescribed by law, whatever rates they saw fit to establish on this traffic.”

§ 180. **Same Subject.—Misquoting Rates.**—If a carrier makes a mistake and quotes the wrong rate, the shipper must nevertheless pay the correct tariff rate, even though he suffer severe loss thereby, and for this loss he has no remedy.<sup>181</sup> In *Poor v. Chicago, B. & Q. R. Co.*, 12 I. C. C. 418, 421, 422, Mr. Commissioner Harlan gives the reason for this decision as follows:

“And of necessity no other conclusion was possible if the integrity of this regulative legislation is to be preserved. If a mistake in naming a rate between two given points is to be accepted as requiring the application of that rate by the carrier, the great principle of equality in rates, to secure which was the very purpose and object of the enactment of these several statutes, might as well be abandoned. If the act of a railroad clerk, whether through mistake or otherwise, in quoting a less than the lawful rate or in inserting a lower rate in a bill of lading is to be held to require or to justify and excuse the substitution of that rate, on a particular shipment, for the lawfully published rate, the effectiveness of such legislation is at an end and its whole purpose destroyed. For past experience shows that billing clerks and other agents of carriers might easily become experts in the making of errors and mistakes in the quotation of rates to favored shippers, while other shippers, less fortunate in their relations with carriers and whose traffic is less important, would be compelled to pay the higher published rates.

“Stability and equality of rates are more important to commercial interests than reduced rates. It was instability and inequality that were the special evils to be remedied; it was the possibility that one shipper, in one way or another, whether by mistake or otherwise, could, and actually did, get a lower rate than another shipper that led to the more string-

181. *Tex. & Pac. Ry. Co. v. Mugg*, 202 U. S. 242, 50 L. Ed. 1011, 26 Sup. Ct. 628; *Gulf C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. Ed. 910, 15 Sup. Ct. 802; *Poor Grain Co. v. Chicago, B. & Q. R. Co.*, 12 I. C. C. 418, 421, 422; *Suffern, Hunt & Co. v. Indiana, D. & W. Ry. Co.*, 7 I. C. C. 255, 278; *Houston & T. O. R. Co. v. Dumas*, 43 S. W. 609; *Chicago, R. I. & P. Ry. Co. v. Hubbell*, 54 Kans. 232, 38 Pac. 266, 5 I. C. R. 241; *Pond-Decker Lumber Co. v. Spencer*, 86 Fed. 346, 30 C. C. A. 430; *Mobile & O. R. Co. v. Dismukes*, 94 Ala. 131, 10 So. 289, 4 I. C. R. 200; *Atchison, T. & S. F. Ry. Co. v. Holmes*, 18 Okla. 92, 90 Pac. 22.

ent legislation. That evil the present amended statute meets in substantially the language of previous legislation."

While Mr. Commissioner Harlan was undoubtedly correct in his conclusion as the law then stood, the ruling was one that frequently worked serious injury to shippers. On this subject the Commission, in its twenty-second annual report, pp. 16, 17, aptly says:

"The Act to Regulate Commerce requires carriers to collect their published rates, under severe penalty, and the Supreme Court of the United States has held that this must be done even though the carrier has quoted to the shipper a different rate, in good faith, upon which the shipper has acted.

"The practical hardship of this rule is illustrated by the last case in which it was applied by that court. *Texas and Pacific Railway Company v. Mugg*, 202 U. S. 242, 50 L. Ed. 1011, 26 Sup. Ct. 628. Here the plaintiff applied for a rate on coal from a point in Arkansas to a point in Texas and was quoted a rate of \$1.25 upon one kind and \$1.50 upon another. Upon the strength of this quotation he made sale of three carloads for a delivered price at the Texas point. In fact, the published rate was \$2.75 upon one kind and \$2.85 upon the other, and the shipper was obliged to pay upon the arrival of the coal in Texas \$140.18 more than would have been due under the rates quoted. This converted the transaction from a profit to a loss, and his suit was to recover damages thus occasioned. The court, as has been said, held that no recovery could be had."

It is undoubtedly true that shippers ordinarily do not know and it would sometimes take an expert to find out what a particular rate is, and, therefore, reliance must be had on the information furnished by the agents of the carriers. The Commission points out the evil but suggests no remedy. It would probably be an effective remedy to allow the Commission to award reparation in such cases as it might find were based upon an honest mistake of the carrier. The Commission would be able to prevent the evils that Mr. Commissioner Harlan points out; and, if necessary to prevent discrimination, the rate mistakenly given might be open to all who ship contemporaneously with the shipper who relied on the misquoted rate.

The Act of 1910 prescribing a penalty for misquoting a rate under certain prescribed conditions makes it illegal to misstate a rate. This provision taken in connection with Section 8 of the Act, presents a situation different from that existing prior to this Amendment and now when the amended provision is violated it is believed that a shipper may recover his damages.<sup>182</sup>

§ 181. **Different Rates over the Same Line in Opposite Directions.**—In the case of *Duncan v. Atchison, T. & S. F. Ry. Co.*,<sup>183</sup> the Commission said:

“The complainant was not discriminated against in being allowed on his shipments west, to Los Angeles, the lowest available rate, and there was no discrimination against him on his shipments east to Louisville, as he was charged the general rate exacted of all shippers. His complaint in reference to the disparity between the rates charged him on his east and west bound shipments, respectively, is not properly one of unjust discrimination under the third section of the act to regulate commerce, but rather calls in question the reasonableness of the higher rate. The claim is in substance, that the rate of \$350 eastward is unreasonable in view of the fact that the rate over the same line and between the same points westward is only \$263. This fact alone is relied upon to support the charge. The two rates have no necessary connection or relation, and the fact that a rate over a road or line in one direction is materially higher than the rate on the same class of traffic over the same road or line and between the same points in the opposite direction does not, as in the case of hauls over the same line in the same direction, establish *prima facie* the unreasonableness of the higher rate. This would appear to be especially true where the hauls are of as great length as those now under consideration. It is moreover in evidence, as remarked above, that the “west-bound movement of the traffic termed ‘emigrants’ movables” is double the east-bound movement,’ and the goods shipped west as ‘emigrants’ movables’ are ‘materially lower in value’

182. Secs. 368, and 382, *post*, and *St. Louis S. W. Ry. Co. v. Lewellen Bros.*, 192 Fed. 540.

183. *Duncan v. Atchison, T. & S. F. R. Co.*, 6 I. C. C. 85, 4 I. C. R. 385.

than those shipped east. It may be conceded that the much greater volume of the traffic moved west than east is to some extent attributable to the lower rate west, but the tide of emigration is naturally from a comparatively old and thickly populated country like the east to a new and sparsely settled country like the west. No evidence as to the unreasonableness of this rate in itself has been offered."

This ruling has been repeated several times by the Commission. In the Duncan case, *supra*, the facts of the case showed a much heavier movement of the goods transported under the shipment there in controversy towards the west than towards the east. This fact is one of the causes that affects rates and may always be considered. The amount of traffic of a particular kind that moves in a particular direction may properly constitute a different circumstance and condition. The conclusion of the Commission was correct, but what was there stated should not be accepted as a general rule. If the movement both ways is practically equal and there are no other differentiating circumstances, the fact that a rate over a road or line in one direction is materially higher than the rate on the same class of traffic over the same road or line and between the same points in the opposite direction does, as in the case of hauls over the same line in the same direction, establish *prima facie* the unreasonableness of the higher rate.

The facts in the MacLoon case<sup>184</sup> while stated by the Commission to be practically the same as in the Duncan case, do not so clearly support the holding as did the facts in the last named case. There was no evidence as to the relative amount of traffic each way and the accommodations seemed to have been practically the same. The charge was greater going west than going east. This case would indicate a disposition on the part of the Commission to make it a general rule that there is no relation between traffic in opposite directions over the same route. In later cases<sup>185</sup> the MacLoon case is cited

184. MacLoon v. Boston & M. Co., 28 I. C. C. 619; Cadillac R. Co., 9 I. C. C. 642, 645. Lumber Ex. v. V. A. R. R. Co.,

185. Hewins v. New York, N. 43 I. C. C. 636; Little Rock H. & H. R. Co., 10 I. C. C. 221, Freight Bureau v. Mo. Pac. Ry. 224; Hull Vehicle Co. v. S. Ry. Co., 51 I. C. C. 23.

and followed. It will be conceded that circumstances may exist justifying a difference in rates over the same line in opposite directions; but, in the absence of proof of such circumstances, such difference is evidence of unjust discrimination, and requires explanation.<sup>186</sup>

§ 182. **Discrimination by Granting Free Service.**—Free tickets, fares, passes, or free transportation for passengers are prohibited, with certain exceptions, by paragraph four of section one of the Act to Regulate Commerce as amended by the Act of April 13, 1908<sup>187</sup>. The provisions requiring the tariff rates to be charged and collected would prevent the free transportation of property, except such as may be had under section 22 of the Act.

The purpose and history of these provisions of the law are given by the Commission in an investigation of the subject of granting passes in Colorado and Montana. In the report of this investigation it was held that to grant an interstate shipper an intrastate pass violates the Act and prosecutions were recommended. It was also shown that a free pass dissipates revenues and when carriers seek rate advances this fact is proper to be considered.<sup>188</sup>

In the *Mottley Case*<sup>189</sup> the Supreme Court had for determination the validity of a contract for transportation made by Mottley in consideration of the settlement of his claim for damages. The contract, although made prior to the statute prohibiting free passes, was held void, the court saying:

“The passenger has no right to buy tickets with service, advertising, releases or property, nor can the railroad company buy services, advertising, releases or property with transportation. The statute manifestly means that the purchase

186. *Int. Com. Com. v. Louisville & N. R. Co.*, 118 Fed. 613, 623. *Well v. Penn. R. Co.*, 11 I. C. C. 627, 629, 630; *Phillips v. Grand Trunk W. R. Co.*, 11 I. C. C. 659, 664, 665; *Pacific Coast Gypsum Co. v. O. W. R. Co.*, 30 I. C. C. 135. *Heider Mfg. Co. v. C. & G. W. R. Co.*, 39 I. C. C. 556, 558; *Merchants Freight Bureau v. M. P. R. Co.*, 50 I. C. C. 247, 248.

187. Sec. 342, *post*.

188. *Re Issuance and Use of Passes*, 26 I. C. C. 491; *Re Issue and Use of Passes — Montana Situation* — 29 I. C. C. 411.

189. *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 477, 55 L. Ed. 297, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671; *Tripp v. M. C. R. Co.*, 238 Fed. 449, 456, 151 C. C. A. 385.

of a transportation ticket by a passenger and its sale by the company shall be consummated only by the former paying cash and by the latter receiving cash of the amount specified in the published tariffs."

While such a contract cannot be specifically enforced, if valid when made, the holder, after the law has prevented its enforcement, may recover damages for its breach.<sup>190</sup> Although the decisions are not uniform and the Supreme Court has not yet decided the question, it would seem that in a suit by a carrier for freight charges the shipper could by plea in recoupment recover damages for loss or injury to the property shipped.<sup>191</sup>

§ 183. **Basing Points, Group Rates and Zone Rates.**—In discussing the reasonableness of rates the questions of basing the rate of one locality on that of another, grouping territory and giving the whole group the same rate, and making rates to or from particular zones were discussed.<sup>192</sup> The description of these systems of rate making there given need not be here repeated. It has there been seen that discrimination could result from such practices, and it is obvious that either of the systems may be so applied as unduly to discriminate for or against a particular locality. But it was shown that the systems were not necessarily illegal, the illegality, if existing, arising from the application of the system.

Generally speaking, competition may force a lower rate at one point than at another. What competition must be considered and the force that must be given thereto present questions having the difficulties which accompany the determination of all questions relating to making or judging rates. Definite water competition is a fact which carriers may consider, and water competition at one point which forces a low rate thereat may be met by a carrier without being compelled to accord the same low rate to another point where

190. *New York C. & H. R. R. Co. v. Gray*, 239 U. S. 583, 60 L. Ed. 451, 36 Sup. Ct. 176; *Irvin v. Postal Tel. & Cable Co.*, 173 Pac. 487.

191. *Wells Fargo & Co. v.*

*Cuneo*, 241 Fed. 727, 730 — *contra*, *Johnson-Brown Co. v. V. V. L. & W. R. Co.*, 239 Fed. 590 and cases cited 592.

192. 108; *supra*.

no such competition exists.<sup>193</sup> But, "every city is entitled to the advantage of its location and may not lawfully be subjected to high freight charges merely because carriers, for reasons of convenience or otherwise, include it with a number of other points in surrounding territory which latter points are not similarly situated."<sup>194</sup> Carriers cannot of their own initiative, nor can they be compelled, "to equalize natural advantages."<sup>195</sup>

In speaking of group rates, the Commission said:

"When general rate adjustments in and between large territories, which contemplate substantial justice between all shippers generally, result in individual instances of disproportionate inequality, they fail in their purpose to that extent, and their strict observance in such cases upon no other ground than the arbitrary theory of their existence, should yield to the extent necessary to prevent gross injustice, just as many other general rules are necessarily subject to exceptions."<sup>196</sup>

The report of the Commission in the Carrollton Board of Trade case,<sup>197</sup> discusses the general subject and holds that distance is a fact requiring consideration.

This system following action under the 1910 Amendment has practically ended in the southeast.<sup>198</sup>

**§ 184. How Far a Rate Made by a State Relieves a Carrier from the Duty to Serve Commodities with Legal Equality.—** That discrimination which the statute prohibits, may result

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| <p>193. Int. Com. Com. v. Alabama M. Ry. Co., 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45; Int. Com. Com. v. Louisville &amp; N. R. Co., 190 U. S. 273, 47 L. Ed. 1047, 23 Sup. Ct. 687; Int. Com. Com. v. Western &amp; A. Ry. Co., 181 U. S. 29, 45 L. Ed. 729, 21 Sup. Ct. 512; Columbia Grocery Co. v. Louisville &amp; N. R. Co., 18 I. C. C. 502.</p> <p>194. Corporation Com. of North Carolina v. Norfolk &amp; W. Ry. Co., 19 I. C. C. 303, 307.</p> <p>195. Elk Cement &amp; Lime Co.</p> | <p>v. Baltimore &amp; O. R. Co., 22 I. C. C. 84, 88.</p> <p>196. Alpha Portland Cement Co. v. Baltimore &amp; O. R. Co., 22 I. C. C. 446, 449; Kaufman Commercial Club v. T. &amp; N. O. R. Co., 31 I. C. C. 167; Coffeyville Commercial Club v. A. T. &amp; S. F. R. Co., 33 I. C. C. 122, 34 I. C. C. 231.</p> <p>197. Board of Trade of Carrollton v. Central of Ga. Ry. Co., 28 I. C. C. 154.</p> <p>198. Green v. A. &amp; V. Ry. Co., 43 I. C. C. 662, 677.</p> |
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from the fact that state made rates applying within a particular state are lower than interstate rates applicable to interstate shipments which are made to compete with like shipments moving under intrastate rates. If Congress has no power to prohibit discrimination when one class of the discriminatory rates is made by a state, there could be the most injurious discrimination from which no remedy would exist. This and similar arguments influenced the Commission in the Shreveport case to direct the carriers there defendant to remove an unlawful discrimination resulting from rates prescribed by the Railroad Commission of Texas. Such an order the courts held was valid.<sup>199</sup>

The doctrine of the Shreveport case has become the accepted rule and the Transportation Act 1920<sup>200</sup> has recognized the doctrine and prescribed rules of procedure for its enforcement.

§ 185. **Commutation, Mileage and Party Rate Ticket.**—Section 22 of the Act provides: "Nothing in this act shall prevent \* \* \* the issuance of mileage, excursion or commutation tickets." The right, however, to issue these special contracts for passenger travel is subject to the provisions of other sections of the Act requiring that all in similar situation shall be accorded like treatment. Commutation tickets must not be accorded to some and denied to other similarly situated.<sup>201</sup>

A dictum of Mr. Justice Holmes supports the conclusion that commutation tickets might be limited in their use to school children, while the opinion of the Commission seems to favor the opposite view.<sup>202</sup> While the question is not free

199. *Houston, E. & W. Ry. Co. v. United States-Shreveport case*, 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833, affirming *Texas & P. R. Co. v. United States*, 205 Fed. 380, and the order of the Commission in *Railroad Com. of La. v. St. L. S. W. Ry. Co.*, 23 I. C. C. 31. See also Sec. 44, *supra*.

200. Transportation Act 1920;

Sec. 393b, *post* —.

201. *Commutation Tickets to School Children*, 17 I. C. C. 144; *Re Restricted Rates*, 20 I. C. C. 426; *Commutation Rate Case*, 21 I. C. C. 428; *Bitzer v. W. V. Ry. Co.*, 24 I. C. C. 225.

202. *Interstate Ry. Co. v. Massachusetts*, 207 U. S. 79, 52 L. Ed. 111, 28 Sup. Ct. 26; affirming *Commonwealth v. Interstate Ry.*

from doubt, the public purpose served, and the absence of damage to any one tends to justify a classification of school children for the purpose of conceding to them special commutation fares.

The Commission has said "commutation tickets will benefit a large number of persons, without operating to the undue prejudice of others."<sup>203</sup> It is not an unjust discrimination to give lower rates for each individual when several travel on one ticket than is accorded each individual traveling alone.<sup>204</sup>

§ 186. **Rebates.**—A rebate within the meaning of the Act to Regulate Commerce means the acceptance by a common carrier of a rate less than that provided for in its tariffs of charges. The most frequent method of rebating was for the carrier to exact the full tariff charge and afterwards "rebate" or pay to the shipper a portion thereof. This rebate was sometimes affected under the guise of a claim for damages by the shipper. In whatever form, whether openly or by the most ingenious and complicated device, all rebates are illegal and punishable under the Elkins law. The desire to obtain equality to shippers and to prevent favoritism was probably the strongest reason for the enactment of the Act to Regulate Commerce. By the unjust and preferential payment of rebates the incomes of carriers were dissipated and the unfortunate shipper who received no rebates had his business destroyed, while his more favored competitor thrived. The views of the Supreme Court, through Mr. Justice White, in *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 391, 52 L. Ed. 515, 521, 26 Sup. Ct. Rep. 272, 277,<sup>205</sup> are apposite here:

"It can not be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates to all and to destroy favoritism, these last being accomplished

Co., 187 Mass. 436, 73 N. E. 530;  
Commutation Tickets to School  
Children, 17 I. C. C. 144.

203. *St. Louis, Mo. Illinois Passenger Fares*, 41 I. C. C. 584, 600, 601.

204. *Int. Com. Com. v. B. & O.*

*R. Co.*, 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844, 4 I. C. R. 92.

205. *New York, N. H. & H. R. Co. v. Interstate Com. Com.*, 200 U. S. 361, 391, 50 L. Ed. 515, 521, 26 Sup. Ct. 272, 277.

by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes, the statute was remedial, and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve \* \* \* The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer."

Mr. Justice Day, after quoting the above remarks in the *Armour Packing Co. case*,<sup>206</sup> said:

"The Elkins act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service, under the same conditions, should be the one established, published, and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published."

Emphasis was given to these principles by the Supreme Court in holding that land cannot be purchased and paid for by conceding to the grantor a rebate although the amount of the rebate is less than the value of the land. Said Mr. Justice Lamar in the opinion of the court: "The commerce act prohibits the payment of rebates, and its command can not be evaded by calling them differentials or concessions, nor by taking the money from the railroad itself or from a company that is proved to be the same as the railroad."<sup>207</sup>

206. *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. 428.

207. *Fouche River Lumber Co. v. Bryant Lumber Co.*, 230 U. S. 816, 57 L. Ed. 1498, 33 Sup. Ct.

The law applies to demurrage charges<sup>208</sup> and each distinct shipment, transportation or transaction constitutes a separate offense.<sup>209</sup>

The venue of suits in prosecutions for granting rebates is in any federal district through which moves the transportation on which the rebate is paid.<sup>210</sup>

When no joint tariff is filed, the sum of the local rates is the valid through rate, and a carrier who issues a through bill of lading and collects less than such rate is guilty of rebating.<sup>211</sup>

§ 187. **Same Subject Corporation Punishable.**—In *New York C. & H. R. R. Co. v. United States*,<sup>212</sup> it was contended that the law could not impute to a corporation the commission of a crime and that the conviction of a corporate common carrier for rebating was illegal. This question is discussed at length, authorities cited and this conclusion arrived at:

“We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agent acts. While the law should have regard to the rights of all, and to those of

887, citing *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. Ed. 397, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671; *United States v. Lehigh Valley R. Co.*, 220 U. S. 257, 55 L. Ed. 458, 31 Sup. Ct. 387; *United States v. Union Stock Yards Co.*, 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83, and reversing *Fouche Lumber Co. v. Bryant Lumber Co.*, 97 Ark. 623, 135 S. W. 796.

208. *Lehigh Valley R. Co. v. United States*, 188 Fed. 879, affirming *United States v. Philadelphia & R. Co.*, 184 Fed. 543, and

*United States v. Lehigh Valley R. Co.*, 184 Fed. 546.

209. *United States v. Standard Oil Co.*, 192 Fed. 438; *New York C. & H. R. R. Co. v. United States*, 212 U. S. 481, 53 L. Ed. 613, 29 Sup. Ct. 304.

210. See note 185, *supra*, this chapter.

211. *Chicago B. & Q. R. Co. v. United States*, 157 Fed. 830. Affirmed 209 U. S. 90, 52 L. Ed. 698, 28 Sup. Ct. 439.

212. *New York C. & H. R. R. Co. v. United States*, 212 U. S. 481, 53 L. Ed. 613, 29 Sup. Ct. 304.

corporations no less than to those of individuals, it can not shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.

“There can be no question of the power of Congress to regulate interstate commerce, to prevent favoritism and to secure equal rights to all engaged in interstate trade. It would be a distinct step backward to hold that Congress can not control those who are conducting this interstate commerce by holding them responsible for the intent and purposes of the agents to whom they have delegated the power to act in the premises.”

This section and the one preceding it are limited to the question of discrimination as the result of rebates. The procedure for determining and punishing rebating will be more fully discussed in a subsequent chapter.”

§ 188. **Summary.**—Obviously many of the facts which must be considered in determining whether a particular rate is reasonable or unreasonable must also be considered in determining whether or not a particular rate is unjustly discriminatory or unduly preferential. Some, therefore, of the principles discussed in section 131, *supra*, are applicable here.

A common carrier performs a public function; the Government permits the carrier to do what the Government itself could do. The charges exacted by the carrier are analogous to taxation. The Government taxes, that it may perform its governmental duties. The Government, it is true, exacts no profit for the service rendered, the common carrier using private capital is permitted to receive, in addition to the actual cost of the service it performs, a fair return on the capital necessarily used to enable it to perform such service. The Government itself would, were it to undertake to perform the service directly, have to obtain capital to supply the

necessary facilities. The Government could furnish the service free to all, obtaining the cost thereof from general taxation, or it could as with the mails make all who use the service pay therefor.

This analogy between taxation and charges by common carriers is sufficient to require that the rule of uniformity applicable to taxation should be observed in fixing the charges which the common carrier may exact.

But uniformity does not mean that every charge must be the same. It means no more than that under the same or similar circumstances the charge exacted shall be gauged alike.

There are different kinds of taxes, but there must be uniformity in the tax on the same or a similar subject-matter.

To get just uniformity, either in taxation or in charges by public service corporations, there must be classification; classification as to the service rendered considering the cost and extent thereof, and classification as to the value the service is to him for whom it is performed.

It has been the aim of the author of this chapter to present the principles which have been applied in making this classification of commodities and distinction in rates. That these principles must yield sometimes is true. That the known facts are not sufficiently comprehensive to justify definite generalizations and a fixed standard to be applied to the problem, must be admitted. But the general rules which have been empirically deduced justify the statement of the Commission that "it is not fanciful to say that a schedule of rates may be made which will approach justice as between services."

## **CHAPTER V.**

### **ENFORCEMENT BY THE COMMISSION OF THE ACT TO REGU- LATE COMMERCE.**

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- 190. Appointment and General Duties of the Commission.**
- 191. Switch Connections. Duty of Carriers.**
- 192. Switch Connections. Powers of the Commission.**
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- 195. Through Routes.**
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- 240. Government Aided Railroads and Telegraph Companies.
- 241. Common Law Remedies.

§ 189. **General Statement of the Functions of the Commission.**—In discussing the scope and validity of the Act to Regulate Commerce *infra* chapter two, it was seen that the Interstate Commerce Commission was an administrative body, with no judicial power, that it is an agency of the legislative department of the Federal Government to which has been delegated the legislative power of prescribing rates for the future. In the performance of its administrative duties, it exercises certain functions in the exercise of which it adopts forms and procedure similar to those in use by courts when enforcing the judicial powers of the government. While in a loose way it is frequently said that the Commission exercises *quasi* judicial powers, it cannot be said that any of the judicial powers conferred by the Constitution of the United States are, or can be, exercised by the Commission. Its duties under existing law naturally divide themselves into two distinct branches. The first of these are purely administrative in their nature. The second is the exercise of its delegated legislative power and consists of prescribing rules, regulations and rates for the future. Under the first head, upon complaint, the Commission, after hearing, may decide that the past practice of a carrier has not been in accord with the law, and it may determine that by such practices the complainant has been

damaged in an amount which the Commission fixes. Its findings awarding reparation may or may not, at the option of the carrier, be obeyed. If the order therefor is obeyed, it is not that the carrier can be compelled to do so by any order of the Commission, but because the carrier recognizes the justice thereof or fears that the courts may do so. If obedience is refused, the Commission, or the parties in whose favor the order is granted, may ask the judicial department of the government to lend its aid to make effective the findings of the Commission. When the matter is brought to the attention of the proper court in such a way as to invoke its action, a hearing is had *de novo*, the findings of the Commission being, by a rule of evidence prescribed by the legislative department, *prima facie* true. Exercising its full and unlimited judicial power, the court may give weight to the findings of the Commission like it might to any other administrative body; but the power to enforce the order is wholly in the courts.

The Commission prescribes forms of accounting which the carriers must obey, prescribes the forms of tariffs and methods of publishing same, and makes conference rulings applicable to the general enforcement of the Act.

By the Amendment of March 1, 1913, the Commission is directed to investigate, ascertain and report the value of all the property owned or used by every common carrier subject to the provisions of the commerce acts.

The Transportation Act 1920 materially increases the powers of the Commission, modifies the language of the former act as to existing powers, gives a right to initiate rates and adds the duty to prescribe minimum rates, makes more definite the duty of the Commission in respect to giving railroad a "fair return" on investment, increases its duties as to the service and distribution of cars, changes from the principle of competition required by former laws, and adopts the principle of coöperation, and adds the right to supervise the issuance of securities and the increase or decrease of existing facilities.<sup>1</sup>

1. For an historical sketch of former statutes and an analysis of the Transportation Act 1920 see articles by the writer hereof *Columbia Law Review*, March 1919, p. 47, *et seq*; Rail-

**§ 190. Appointment and General Duties of the Commission.**

—The Interstate Commerce Commission is composed of eleven members, whose terms of office are seven years each, and each of whom receives an annual salary of twelve thousand dollars. They are appointed by the President by and with the advice and consent of the Senate. Not more than six of the commissioners may be of the same political party, and they may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. They shall not engage in any other business, vocation, or employment. The principal office of the Commission shall be in Washington, where its general sessions shall be held; but whenever the convenience of the public or of the parties may be promoted, or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of the act. It shall inquire into the management of the business of all common carriers subject to the act, and is authorized and required to enforce such act. It has power to require, by subpoena, the attendance of witnesses and the production of books and it may order testimony taken by depositions. Every order of the Commission shall be forthwith served by mailing to any one of the principal officers or agents of the carrier at his usual place of business a copy thereof; and the registry mail receipt shall be *prima facie* evidence of the receipt of such order by the carrier. It may suspend or modify its orders and grant rehearings. It has power to require reports from carriers subject to the act and to prescribe forms for accounting by carriers. It must itself make annual reports to Congress.

**§ 191. Switch Connections—Duty of Carrier.**—It is the duty of any common carrier subject to the provisions of the Interstate Commerce Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, to construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may

be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same, and to furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper.\*

Under section one of the Act of March 4, 1887, as amended by the Act of June 29, 1906, the Supreme Court held that the Interstate Commerce Commission had power to compel switch connections with lateral branch roads only at the instance of shippers and that it had no power to compel switch connections on the application of a branch railroad.†

The amendment of June 18, 1910, however, gives the right to "any lateral, branch line of railroad," as well as to any shipper.

In construing the words "lateral branch line," the Supreme Court gave as examples of such lines, "those that are dependent upon and incident to the main line—feeders, such as may be built from mines or forests to bring coal, ore or lumber to the main line for shipment," and the court held that the question of whether or not a particular line comes within the meaning of the statutory language must be determined by what the line is, and not by what it may become.‡

§ 192. **Switch Connections—Power of the Commission.**—Should a carrier fail to perform the duty to make switch connections, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad, may make complaint, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and the justification and the reasonable compensation therefor, and the Commission may make an

road Herald April 1920, p. —, *et seq.*

2. Paragraphs 4 and 9 of Section 1 of Interstate Commerce Act sections 338, 344, *post*.

3. Interstate Com. Com. v. Delaware, L. & W. R. Co., 216 U. S. 531, 54 L. Ed. 605, 30 Sup. Ct. 415.

4. United States v. Baltimore & O. R. Co., 226 U. S. 14, 57 L. Ed. 104, 33 Sup. Ct. 5, affirming Baltimore & O. R. Co. v. United States, 195 Fed. 962, Opinion Commerce Court No. 60, p. 431. For order of the Commission see, Cincinnati & Columbus Traction Co. v. Baltimore & O. R.

order directing the common carrier to comply with the provisions of the statute in accordance with such order.<sup>5</sup>

This provision is supplemented by the Transportation Act 1920 which authorizes the Commission, when in the public interest and practicable, to require that existing terminal facilities, including main line track or tracks for a reasonable distance, to be opened to a joint use under such terms and for such compensation as may be agreed on or fixed.<sup>6</sup>

When there is an application for a switch connection made as provided by statute and the evidence shows an existing siding from which interstate freight is tendered, that there is sufficient business to justify the construction and maintenance of the switch and the connection is reasonably practicable and safe, the Commission will order a connection.<sup>7</sup>

There must, however, be an existing side track or lateral branch line of railroad with which the connection can be made,<sup>8</sup> and the Commission has no jurisdiction to enforce a contract for such connection.<sup>9</sup>

The prohibition against requiring a carrier to give the use of its tracks, terminals and facilities to a competing carrier, does not prevent the Commission in a proper case from requiring a carrier to receive cars from a connection for transportation over its tracks and terminals. Such a requirement when the haul is "a substantial part of a continuous transportation routing" and necessary to such movement, is a proper regulation of the business of the carrier and not an appropriation of terminal facilities for the use and benefit

Co., 20 I. C. C. 486. Following the Supreme Court see, *St. Louis, S. & P. R. Co. v. Peoria & P. U. Ry. Co.*, 26 I. C. C. 226; *Morris Iron Co. v. Baltimore & O. R. Co.*, 26 I. C. C. 240.

5. Par. 9 of section 1 as numbered by Transportation Act 1920.

6. Transportation Act 1920, section 405, paragraph 4 of section 3 of Interstate Commerce Act, section 347a, *post*. See for old law *Morris Iron Co. v. B. & O. R.*

Co., 26 I. C. C. 240, 243, 244; *Louisville Board of Trade v. L. & N. R. Co.*, 40 I. C. C. 679, 688 and cases cited; *Guyton & Harrington Mule Co. v. L. & N. R. Co.*, 50 I. C. C. 546.

7. *Ridgewood Coal Co. v. Lehigh Valley R. Co.*, 21 I. C. C. 183, 185.

8. *Winters Metallic Paint Co. v. Chicago, M. & St. P. Ry. Co.*, 16 I. C. C. 637.

9. *Ralston Townsite Co. v.*

of another road.<sup>10</sup> For the transportation over its tracks the carrier performing the service is entitled to a reasonable compensation.<sup>11</sup>

The provision of Transportation Act 1920 under which a joint use of terminals may be required supersedes the former law prohibiting the requirement that a carrier should be compelled to give the use of its terminals. Under the amendment the use of terminals are not given; but may, in analogy to the right of eminent domain, be opened to a joint use upon fair compensation.

**§ 193. Industrial Switches and Railways.**—The jurisdiction of the Commission to require switch connections includes the power and imposes the duty to regulate such connections. Many industries own private switch tracks connecting with a carrier; some of the tracks privately owned have developed so far as to become incorporated as railways. That connections may in proper cases be required to be made by the carriers with these industrial tracks or industrial railways has been shown in the preceding section. When such connections are made, cars are delivered from the line of the carrier to the industrial track or railway, and sometimes the line carrier delivers incoming cars over and takes outgoing cars from the plant tracks. Obviously such delivery and receipt of cars is valuable to the industry and costs the carrier something. Carriers have made allowances from their rates to such industries or to their subsidiary railways in the form of rate divisions, per diem reclaims, remission of car demurrage, furnace allowances, and have performed services without additional charges over the line rate by placing cars at points on the tracks or railways of the industry.

Missouri Pac. Ry. Co., 22 I. C. C. 354.

10. Grand Trunk R. Co. v. Michigan Railroad Com., 231 U. S. 457, 58 L. Ed. 310, 34 Sup. Ct. 152; Michigan C. R. Co. v. Michigan Railroad Com., 236 U. S. 615, 59 L. Ed. 750, 35 Sup. Ct. 422;

Penn. Co. v. U. S. 236 U. S. 351, 59 L. Ed. 616, 35 Sup. Ct. 370; Ill. Cent. R. Co. v. Railroad Com. of La., 236 U. S., 157, 59 L. Ed. 517, 35 Sup. Ct. 275.

11. So. Ry. Co. v. St. Louis Hay & Grain Co., 214 U. S. 297, 53 L. Ed. 1004, 29 Sup. Ct. 678.

These allowances and remissions were discussed by the Commission in the First Industrial Railways case,<sup>12</sup> and held to be illegal.

"Spotting cars" in so far as the phrase has a definite meaning, is the service performed by a line carrier of placing or receiving cars for a plant beyond the point of interchange between the rails of the carrier and the tracks of the industry, and, as such practice is so defined, it was held illegal unless a reasonable charge was made for the service.<sup>13</sup>

In prior sections it has been shown that allowances sometimes called absorptions, at other times called divisions, are not unlawful.<sup>14</sup>

**§ 194. Switch Connections with Carriers by Water.**—The Panama Canal Act gives jurisdiction to the Commission over interstate transportation "by rail and water through the Panama Canal or otherwise," and "of the carriers, both by rail and by water, which may or do engage in the same," and gives the Commission power to establish physical connections between the lines of the rail carrier and the dock of the water carrier at which interchange of passengers or property is to be made when such "connection is reasonably practicable"

12. Industrial Railways Case, 29 I. C. C. 212.

13. Industrial Railway Case, 29 I. C. C. 212, 234. Spotting was defined in a tariff suspended by the Commission as "service beyond a reasonable convenient point of exchange." In a brief it was defined as "placing a car at a particular spot." See also *Alan Wood Iron & Steel Co. v. Pennsylvania R. Co.*, 22 I. C. C. 540; *National Tube Co. v. Lake Tex. R. Co.*, 56 I. C. C. 272.

14. *Atchison, T. & S. F. Ry. Co. v. Interstate Com. Com.*, 188 Fed. 229 and 929, Opinion Commerce Court No. 2, p. 3, enjoining the order of the Commission in *Associated Jobbers of Los Angeles v. Atchison, T. & S. F.*

*Ry. Co.*, 18 I. C. C. 310. Commerce Court reversed, *Interstate Com. Com. v. Atchison, T. & S. F. Ry. Co.*, 234 U. S. 294, 58 L. Ed. 1319, 34 Sup. Ct. 814; Secs. 170, 171, *supra*. Tap Line Cases, 234 U. S. 1, 58 L. Ed. 1185, 34 Sup. Ct. 741; *Manufacturers' Railway Co. v. St. L. I. M. & S. Ry. Co.*, 32 I. C. C. 578; *Industrial Railways Case*, 32 I. C. C. 129; *Car Ferry Allowance at Cheboygan*, 32 I. C. C. 578; *Trap or Ferry Car Service Charges*, 34 I. C. C. 516; *Second Industrial Railways Case*, 34 I. C. C. 596; *Car Spotting Charges*, 34 I. C. C. 609; *Manufacturer's R. Co. v. United States*, 246 U. S. 457, 62 L. Ed. 831, 38 Sup. Ct. 383. Section 170 and 171, *supra*.

and "can be made with safety to the public, and the amount of business to be handled is sufficient to justify the outlay."<sup>15</sup>

It was argued before the Commission that the words "or otherwise" modified the phrase "by rail and water" and not the phrase "through the Panama Canal." This construction was not adopted and it was held that by reason of the words "or otherwise," the Commission had jurisdiction to establish through routes and joint rates between rail carriers and water carriers, those operating through the Canal and those operating on other waters. Not to adopt the construction given the statute by the Commission would leave the words "or otherwise" mere surplusage, to do which would violate the fundamental canons of statutory construction.<sup>16</sup>

The change made by Transportation Act 1920 in this provision makes more specific than the old law, the dock at which interchange may be required. Paragraph 4 of section 15 as amended provided, as the Commission had already held in the Baltimore and Carolina Steamship Case, note 16, *supra*, that the short haul limitation of section 15 did not apply when one of the connecting "carriers is a water line."

§ 195. **Through Routes.**—It is made the duty of the carriers subject to the Act "to establish through routes."<sup>17</sup>

The Commission may, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of the Act, and the carriers complained to have refused or neglected voluntarily to establish such through routes and joint rates. This jurisdiction exists when one of the carriers is a water line.

15. Act March 24, 1912, Sec. 377, *post*.

16. *Augusta & Savannah Steamboat Co. v. Ocean Steamship Co.*, 26 I. C. C. 380, 385; *Federal Sugar Refining Co. v. Central R. Co., of New Jersey*, 35 I. C. C. 488; *Decatur Navigation Co. v. L. & N. R. Co.*, 31 I. C. C. 281;

*Bowling Green Bus. Men's Protective Asso., v. L. & N. R. Co.*, 31 I. C. C. 1; *Pacific Nav. Co., v. S. P. Co.*, 31 I. C. C. 472; *Port Huron & Duluth S. S. Co. v. P. R. Co.*, 35 I. C. C. 475; *Baltimore & Carolina S. S. Co. v. A. C. L. R. Co.*, 49 I. C. C. 176, 179.

17. Sec. 1 of Act, Sec. 338, *post*.

The Panama Canal Act, as shown in the preceding section, extended the power of the Commission over transportation by water and also gave the Commission power to establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.<sup>18</sup>

The Amendment of June 18, 1910, omitted from the statute the words, "provided no reasonable or satisfactory through route exists." Under the old law, the non-existence of a reasonable or satisfactory through route was jurisdictional, and where there was such through route the Commission had no power to order another.<sup>19</sup>

Under the old law it was said:

"It may be laid down as a general rule, admitting of no qualification, that a manufacturer or merchant who has traffic to move and is ready to pay a reasonable rate for the service, has a right to have it moved and to have reasonable rates established for the movement regardless of the fact that the revenues of the carrier may be reduced by reason of its competition with other shippers in the same market; and he has the right also to have the benefit of through routes and reasonable joint rates to such distant markets if no reasonable or satisfactory through route already exists."<sup>20</sup>

A limitation as to the character of the through route was prescribed by the Amendment of 1910 by the provision that

18. Act of August 24, 1912, Secs. 376, 377, *post*; *Augusta & Savannah Steamboat Co. v. Ocean Steamship Co.*, 26 I. C. C. 380; *Truckers Transfer Co. v. Charleston & W. C. Ry. Co.*, 27 I. C. C. 275. See also note 16, *supra*.

19. *Interstate Com. Com. v. Northern Pac. Ry. Co.*, 216 U. Ct. 417; *Enterprise Transportation Co. v. Pennsylvania R. Co.*, S. 538, 54 L. Ed. 608, 30 Sup. 12 I. C. C. 326; *Enterprise Transportation Co. v. Pennsylvania R. Co.*, 16 I. C. C. 219,

222; *Southern California Sugar Co. v. San Pedro, L. A. & R. Co.*, 19 I. C. C. 6; *Cedar Hill Coal & coke Co. v. Colorado & S. Ry. Co.*, 17 I. C. C. 479; *Spring Hill Coal Co. v. Erie R. Co.*, 18 I. C. C. 508; *Pacific Coast Lumber Mnfg. Assn. v. Northern Pac. R. Co.*, 14 I. C. C. 51, 53.

20. *Cardiff Coal Co. v. Chicago, M. & St. P. Ry. Co.*, 13 I. C. C. 460. As sustaining the text see *P. R. Co. v. United States*, 236 U. S. 351, 59 L. Ed. 616, 35 Sup. Ct. 370.

no company without its consent should be required to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroads operated in conjunction and under a common management or control therewith."

By the Transportation Act 1920 this limitation does not apply when one of the carriers is a water carrier."

While the limitation is stated positively, a carrier could not use it to discriminate in violation of other provisions of the Act," nor is it a protection to the carrier in charging an unreasonable rate between two given points. It means that a carrier shall not be deprived of a haul which it is capable of providing by a reasonably direct route." Other than this limitation under the law as it now exists, the Commission has discretionary power."

The Commission refused to establish a through route with tugs and barges operated by the owner of practically the whole freight which would use the route if one were established;" but the mere fact that only one shipper may at the outset use the connection, does not prevent the connection from having a public purpose."

The Commission having no jurisdiction of railroads and steamship lines located, owned and operated entirely in an adjacent foreign country, cannot establish through routes therewith."

21. Sec. 401, *post*, for full text of provision.

22. Transportation Act 1920, Sec. 418; Int. Com. Act, Sec. 15, par. 4.

23. Proposition urged but not decided, Hughes Creek Coal Co. v. Kanawha & M. Ry. Co., 29 I. C. C. 671, 679.

24. Meridan Fertz. Factory v. Texas & Pac. Ry. Co., 26 I. C. C. 351, 352.

25. Truckers Transfer Co. v. Charleston & W. C. Ry. Co., 27 I. C. C. 275, 277, quoting the Commerce Court in Crane Iron Works v. United States, 209 Fed.

238, Commerce Court Opinion No. 55, p. 453, 461, not appealed. For report of the Commission in the same case see: Crane Iron Works v. Central R. Co. of New Jersey, 17 I. C. C. 514; and Crane R. Co. v. Philadelphia & R. Ry. Co., 15 I. C. C. 248.

26. Gulf Coast Navigation Co. v. Kansas City Sou. Ry. Co., 19 I. C. C. 544.

27. Union Lime Co. v. C. & N. W. Ry. Co., 233 U. S. 211, 58 L. Ed. 924, 34 Sup. Ct. 522; Federal Sugar Refining Co. v. C. of N. J. Ry. Co., 35 I. C. C. 488.

28. Humbolt Steamship Co. v.

Agreements between connecting railway and steamship carriers to establish through routes and joint rates and to refuse such an arrangement with other connecting carriers, resulting in high and discriminatory charges, with the intent and result of eliminating competition, violates the anti-trust laws of the United States. Whether or not the giving or refusing joint traffic arrangements is in violation of the commerce acts, is a question which the courts have no jurisdiction to determine in advance of action by the Interstate Commerce Commission."

The broad purpose of this provision is well stated by the Commission as follows:

"The railroads of the country are called upon to so unite themselves that they will constitute one national system; they must establish through routes, keep these routes open and in operation, furnish the necessary facilities for transportation, make reasonable and proper rules of practice as between themselves and the shippers, and as between each other." "

A carrier publishing a joint through rate is responsible therefor." Electric railways are entitled to through routes and joint rates."

§ 196. **Division of Joint Rate.**—When joint rates are established by order of the Commission, or otherwise, and carriers fail to agree among themselves upon the apportionment or division thereof, the Commission may, after hearing, prescribe the just and reasonable proportion of such joint rate to be received by each carrier party thereto." Speaking of this power

White Pass & Yukon Route, 25 I. C. C. 136.

29. *United States v. Pacific & Arctic Ry. Nav. Co.*, 228 U. S. 87, 57 L. Ed. 742, 33 Sup. Ct. 443.

30. *Missouri & Illinois Coal Co. v. Illinois Cent. R. Co.*, 22 I. C. C. 39, 45.

31. *Black Horse Tob. Co. v. Illinois Cent. R. Co.*, 17 I. C. C. 588; *Texico Transfer Co. v. Louisville & N. R. Co.*, 20 I. C. C. 17.

32. *Louisville Board of Trade v. Indianapolis, C. & S. T. Co.*, 27 I. C. C. 499, and cases cited. That a through route could not be made with the Columbus Traction Co. was placed on the ground that such company was not a lateral branch road. *United States v. Baltimore & O. R. Co.*, 226 U. S. 14, 57 L. Ed., 104, 33 Sup. Ct. 5.

33. Secs. 397, and 400, *post*.

Mr. Commissioner Harlan, delivering the opinion of the Commission, said:\*

"The phrase 'the just and reasonable proportion of such joint rate to be received by each carrier' necessarily implies that it is the duty of the commission in fixing divisions to take into consideration all the circumstances, conditions, and proper adjustment of the situation as between the two roads, and precludes the idea that joint rates must be divided between the participating carriers on a mileage or any other fixed basis."

In note 34, *supra*, the opinion was expressed in the second edition of this book that the Commission was competent to prescribe divisions of rates even though the rates had not been established by it. At first the Commission did not take this view, but subsequently it adopted the correct view." The Transportation Act 1920\*\* specifically gives the Commission the power which it had already come to hold that it possessed.

**§ 197. Allowance to Shippers for Services and Facilities.—**  
The statute reads:\*

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is

34. *Star Grain & Lumber Co. v. Atchison, T. & S. F. Ry. Co.*, 14 I. C. C. 364, 370. Without giving force to the words "or otherwise" in the statute the Commission expressed a doubt as to its power to prescribe divisions of rates not fixed by it. *Re Wharfage Charges at Galveston*, 23 I. C. C. 535, 546. Giving force to all the words of the statute there seems to be no room to doubt the jurisdiction of the Commission in all cases where there is a failure of the carriers to agree. 37 I. C. C. 231.

35. *Morganton & Kingwood Divisions*, 40 I. C. C. 509, 49 I. C. C. 540. For cases illustrating the exercise of the power see *Western P. R. Co. v. S. P. Co.* 55 I. C. C. 71; *Chestnut Ridge Ry. Co. v. United States* 247 Fed. 791.

36. *Transportation Act 1920*, Sec. 418; *Int. Commerce Act* Sec. 15, par. 6.

37. Sec. 15 being added thereto by Act June 29, 1906, *post*, Sec. 404.

just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and to fix the same by appropriate order."

This statute has received consideration in many cases. It is not open to question that when a shipper renders services connected with the transportation of his goods or furnishes any instrumentality used therein, a charge and allowance therefor is recognized by the law. This charge and allowance must be just and reasonable, that is, it must not be too high nor discriminate against another shipper rendering a like service or furnishing a like instrumentality."

The Commission has held that this charge and allowance must be limited to the cost of the service."

The Commission in the Sugar Lighterage case<sup>38</sup> did not deny the validity or application of the statute, but held the fact that one sugar refinery owned and operated a dock and terminals for the railroad did not justify an allowance thereto when such allowance was denied another refinery owning no

38. *Central Stock Yards Co. v. Louisville & N. R. Co.*, 67 Fed. 339; *Railroad Com. of Kentucky v. Louisville & N. R. Co.*, 10 I. S. 568, 48 L. Ed. 565, 24 Sup. Ct. 339; *Louisville & N. R. Co.*, 192 U. C. C. 173; *Cattle Raisers Assn. v. Chicago, B. & Q. R. Co.*, 11 Ed. 73, 11 Sup. Ct. 461; *Butchers, etc., Stock Yards Co. v.* 35, 14 C. C. A. 290; *United States v. Keith*, 139 U. S. 128, 35 L. R. A. 213, affirmed, 192 U. S. I. C. C. 277; *Central Stock Yards Co. v. Louisville & N. R. Co.*, 118 Fed. 113, 55 C. C. A. 63, 63 L. 568, 48 L. Ed. 565, 24 Sup. Ct. 339; *Covington Stock Yards Co. v. Delaware, L. & W. R. Co.* (C. C.), 40 Fed. 101; *Consolidated Fordg. Co. v. Southern Pac. Co.*, 9 I. C. C. 182; *Excursion Car Co. v. Pennsylvania R. Co.*, 3 I. C. C. 577; *In re Transportation of Fruit*, 10 I. C. C. 360; *Peavey Co. v. Union Pac. R. Co.* (C.C.) 176 Fed. 409, affirmed 222 U. S. 42, 56 L. Ed. 83, 32 Sup. Ct. 22; *Interstate Com. Com. v. Dffenbaugh*, 222 U. S. 42, 56 L. Ed. 83, 32 Sup. Ct. 22; *Fouche River Lumber Co. v. Bryant Lumber Co.*, 230 U. S. 816, 57 L. Ed. 1498, 33 Sup. Ct. 887; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916.
39. *Re Allowances to Elevators*, 12 I. C. C. 85; *Federal Sugar Refining Co. v. Baltimore & O. R. Co.*, 17 I. C. C. 40, 47.
40. *Federal Sugar Refining Co. v. Baltimore & O. R. Co.*, 20 I. C. C. 200.

such terminals but tendering sugar brought by boat to the same pier as that to which the first company brought its sugar. The issue of law in this case was therefore whether or not undue discrimination existed. This issue of law was determined by the Commerce Court differently from the Commission. The Commerce Court said:<sup>41</sup>

"We find Arbuckle Bros. owning the Jay Street terminal, used as a public terminal of petitioners within the lighterage limits. We find the Federal Sugar Refining Company, with its refinery at Yonkers, 10 miles north of the lighterage limits, owning and operating no public terminal for petitioners, and tendering petitioners no freight at any of their public terminals. So that we cannot see how any violation of either section 2 or section 3 can be predicated of the facts stated in the record." The Supreme Court held there was no undue discrimination and affirmed the decision of the Commerce Court.<sup>42</sup>

The Supreme Court held allowances to grain elevators proper,<sup>43</sup> but that such allowances should be free from discrimination.<sup>44</sup>

The so-called tap line allowances or divisions to short roads owned or controlled by a shipper must be without discrimination, otherwise, said the Supreme Court, "it amounts to a rebate."<sup>45</sup>

What this allowance means was considered and discussed by the Commission in the tap line case.<sup>46</sup> The Supreme Court reversed the order of the Commission and held that tap line allowances were legal.<sup>47</sup>

Industrial railways present similar questions. These have been discussed sections 171 & 193 *supra*.

41. *Baltimore & O. R. Co. v. United States*, 200 Fed. 779, Opinion Commerce Court No. 35, p. 499.

42. *United States v. Baltimore & O. R. Co.*, 231 U. S. 274, 58 L. Ed. 218, 34 Sup. Ct. 75.

43. *Interstate Com. Com. v. Diefenbaugh*, 222 U. S. 42, 56 L. Ed. 83, 32 Sup. Ct. 22.

44. *Union, Pac. Ry. Co. v. Up-*

*dike*, 222 U. S. 215, 56 L. Ed. 171, 32 Sup. Ct. 39.

45. *Illinois Cent. R. Co. v. Interstate Com. Com.*, 206 U. S. 441, 444, 51 L. Ed. 1128, 27 Sup. Ct. 700.

46. *Tap Line Case*, 23 I. C. C. 277 and 549 and see section 170, *supra*.

47. *United States v. Louisiana & P. R. Co. — Tap Line Cases*, 234

The meaning of the word "transportation" in this connection was defined by District Judge Rellstab in an opinion which as to this question seems to be comprehensive, clear and accurate. Under his definition, draying sugar from a refinery to a railroad was not transportation nor service in connection therewith within the legislative meaning, but was a drayage service falling normally upon the shipper." The decision of Judge Rellstab was reversed, but the opinion on appeal is not inconsistent with the definition of the court below, but is explainable on the theory that the Circuit Court of Appeals held that a payment made to all in like condition was not a rebate, whether an allowance within the meaning of section 15 or not."

§ 198 **Distribution of Cars.**—Transportation includes cars and other vehicles and all instrumentalities and facilities of shipment or carriage, and it is the duty of every carrier subject to the provisions of the Act to Regulate Commerce to provide and furnish transportation. The Commission is given jurisdiction to enforce this duty. Where carriers fail to furnish cars without discrimination this jurisdiction may be involved that the governmental power of regulation may be used in compelling a just and equal distribution of cars and the prevention of an unjust and discriminating one.

In determining whether a particular car distribution is just and equal or unjust and discriminatory, the Commission may consider the producing capacity of the shippers and all cars used in the transportation whether private cars or cars used by the carrier for its own fuel, and the courts have no jurisdiction over the question until after action thereon by the Commission."

U. S. 1, 58 L. Ed. 1185, 34 Sup. Ct. 741, 34 I. C. C. 116.

48. American Sugar Refining Co. v. Delaware, L. & W. Ry. Co., 200 Fed. 652. See also, Atchison, T. & S. F. Ry. Co. v. Interstate Com. Com., 138 Fed. 229 and 929, Opinion Commerce Court No. 2, p. 3, enjoining the order of the Commission in Associated Jobbers of Los

Angeles v. Atchison, T. & S. F. Ry. Co., 18 I. C. C. 310. Commerce Court reversed, Interstate Com. Com. v. Atchison, T. & S. F. Ry. Co., 234 U. S. 294, 58 L. Ed. 1319, 34 Sup. Ct. 814.

49. American Sugar Refining Co. v. Delaware, L. & W. Ry. Co., 207 Fed. 733, 125 C. C. A. 251.

50. Interstate Com. Com. v. Illinois Cent. R. Co., 215 U. S. 452,

Where, however, the question involved is not the administrative question of what is a reasonable rule, but the judicial question of whether or not the rule in force has been complied with, the courts have jurisdiction without prior action by the Commission."

§ 198A. **Furnishing Cars—Car Service.**—The duty to furnish cars and the limitations in respect thereto on the power of the Commission was discussed in sections 24 to 26, *supra*. The Transportation Act 1920 gives the Commission powers properly within its functions over car service." The method of exercising these powers is similar to the procedure adopted in enforcing the other powers of the Commission."

§ 199. **Long and Short Haul Provisions, History of.**—Section four of the original Act to Regulate Commerce" prohibited "under substantially similar circumstances and conditions" a greater charge for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. The proviso to this section gave power to the Commission to relieve carriers from the requirements thereof.

Judge Cooley in construing this section and provision announced principles which may be quoted, as such principles finally became the settled construction of the law. He said:"

54 L. Ed. 280, 30 Sup. Ct. 155; Interstate Com. Com. v. Chicago & A. R. Co., 215 U. S. 479, 54 L. Ed. 291, 30 Sup. Ct. 163; Baltimore & O. R. Co. v. United States ex rel. Pitcairn Coal Co., 215 U. S. 481, 54 L. Ed. 292, 30 Sup. Ct. 164; Vulcan Coal Mining Co. v. I. C. R. Co., 33 I. C. C. 52.

51. Morrisdale Coal Co. v. Penn. R. Co., 230 U. S. 304, 57 L. Ed. 1474, 33 Sup. Ct. 938; Penn. R. Co. v. Puritan Coal Co., 237 U. S. 121, 59 L. Ed. 867, 35 Sup. Ct. 484; Ill. C. R. Co. v. Mulberry Hill Coal Co., 238 U. S. 275, 59 L. Ed. 1306, 35 Sup. Ct. 760; Penn. R. Co. v. Clark Bros. Coal Min-

ing Co., 238 U. S. 456, 59 L. Ed. 1406, 35 Sup. Ct. 896.

52. Transportation Act 1920, Sec. 402; Interstate Commerce Act, Sec. 1, paragraph 10 to 17, Secs. 344a to 344h, *post*.

53. See Car Supply Investigation, 42 I. C. C. 657, and comments of Mr. Commissioner McChord 47 I. C. C. 760, *et seq*.

54. Act. Feby. 4, 1887, Chap. 104, 24 Stat. L. 379 U. S. Comp. Stat. 1916 Sections 8563 *et seq*. 3 Fed. Stat. Ann. 809, *et seq*. See *post* Sections 348 to 351.

55. Re Petition Louisville & N. R. Co., and Southern Pacific Railway and Steamship Co., 1 I. C. C. 31, 57, 1 I. C. R. 278.

"That which the act does not declare unlawful must remain lawful if it was so before; and that which it fails to forbid the carrier is left at liberty to do without permission of any one. The charging or receiving the greater compensation for the shorter than the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions; and, therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, since if the circumstances and conditions of the two hauls are dissimilar the statute is not violated.

"Should an interested party dispute that the action of the carrier was warranted, an issue would be presented for adjudication, and the risks of that adjudication the carrier would necessarily assume. The later clause in the same section, which empowers the Commission to make orders for relief in its discretion, does not in doing so restrict it to a finding of circumstances and conditions strictly dissimilar, but seems intended to give a discretionary authority for cases that could not well be indicated in advance by general designation, while the cases which upon their facts should be acted upon as clearly exceptional would be left for adjudication when the action of the carrier was challenged. The statute becomes on this construction practical, and this section may be enforced without serious embarrassment."

In a later case the Commission refused to follow the opinion of Judge Cooley," but subsequently the Supreme Court adopted the Cooley rule," with Mr. Justice Harlan vigorously

56. *Railroad Com. of Georgia, Trammell et al. v. Clyde S. S. Co.*, 5 I. C. C. 324, 4 I. C. R. 120, 150.

57. The history of the judicial construction appears from the following cases: *Int. Com. Com. v. Alabama M. R. Co.*, 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45; *Int. Com. Com. v. Cincinnati, N. O. & T. P. Ry. Co.*, 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700; *Parsons v. Chicago &*

*N. W. Ry. Co.*, 167 U. S. 447, 42 L. Ed. 231, 17 Sup. Ct. 887; *Int. Com. Com. v. Detroit, G. H. & M. Ry. Co.*, 167 U. S. 633, 42 L. Ed. 306, 17 Sup. Ct. 986; *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. 209; *East Tenn., Va. & Ga. Ry. Co. v. Int. Com. Com.*, 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. 516. See also *Int. Com. Com. v. Clyde S. S. Co.*, 181 U. S. 29, 45 L. Ed. 729, 21 Sup. Ct. 512;

dissenting. It was held that the burden of proof to show dissimilarity of circumstances was on the carrier, and that "line" used in the statute meant a physical line and not a mere business arrangement.

§ 200. **Relationship of Intermediate and Through Rates.**—The amended fourth section also makes it unlawful "to charge any greater compensation as a through route than the aggregate of intermediate rates subject to the provisions" of the Act to Regulate Commerce.

This rule but makes statutory what was a general principle applied by the Commission.

§ 201. **Water Competition.**—The second paragraph of section four of the amended Act provides:

"Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

§ 202. **Power of the Commission under the Fourth Section.**—The fourth section prohibits three things, (a) a greater charge for a shorter than a longer haul under the circumstances named, (b) a greater charge for a through route than the aggregate of the intermediate rates subject to the Act, (c) an increase of rates which had been lowered in competition with water routes.

These provisions leave carriers no discretion. They must be obeyed unless the Commission orders otherwise. The exceptions to this absolute provision must be such as the Commission may prescribe. This is the fundamental difference between the old section as construed and the present law.

Int. Com. Com. v. Louisville & N. R. Co., 190 U. S. 273, 47 L. Ed. 1047, 23 Sup. Ct. 687; Brewer v. Central of Ga. R. Co., 84 Fed. 258; Int. Com. Com. v. Western & A. R. Co., 88 Fed. 186; Spartansburg Board of Trade v. Richmond & D. R. Co., 2 I. C. C. 304, 2 I. C. R. 193; Boston & A. R. Co. v. Boston & L. R. Co., 1 I. C. C. 158, 1 I. C. R. 500, 571; Daniels v. Chicago R. I. & P. R. Co., 6 I. C. C. 458, 476. See sections 152 to 155, *supra* and 348 to 351, *post*.

The power is given the Commission upon application, after investigation, to authorize the carrier "to charge less for longer than for shorter distances," and to "prescribe the extent to which such designated common carrier may be relieved from the operation of the section."

The provision giving the right to prescribe the extent of relief which may be granted, might with reason be construed as being limited by the language giving authority to "charge less for longer than for shorter distances;" although the practice of the Commission has been to relieve from the provision relating to through routes and aggregate intermediate rates as well as limiting the relation of charges in the long and short haul clause.

Rates lawfully in existence when the amended law was passed were not required to be changed prior to the expiration of six months after such time, nor then, when application for relief was filed, "until a determination of such application by the Commission."

The Commission also has power to permit an increase of rates lowered to meet water competition "upon changed conditions other than the elimination of water competition."

In determining its power under this statute the Commission held the law constitutional, that the provision for exceptions to the general clause did not give the Commission arbitrary or absolute power, that the burden was on the carrier to show facts authorizing an exception to the general rule, and that the object of the law was to make "a rule of well nigh universal application," deviation from which could only be authorized "to meet transportation circumstances which are beyond the carrier's control," and then only to the extent necessary to meet such conditions." The orders of the Commission in the cases in which these principles were announced were set aside by the Commerce Court." Upon appeal the Supreme Court reversed the Commerce Court and sustained the jurisdiction of the Commission."

58. Railroad Com. of Nevada v. v. United States, 191 Fed. 856, Southern Pac. Co., 21 I. C. C. 329, Opinion Commerce Court Nos. 341; Spokane, City of, v. North- 50, 51, p. 229.  
ern Pac. R. Co., 21 I. C. C. 400. 60. United States v. Atchison, T. & S. F. Ry. Co. & S. F. Ry. Co., Intermountain

The further limitations on the right of the Commission to grant relief from the long-and-short haul provision of section 4 contained in Transportation Act 1920 are discussed in sections 152 to 155, *supra*.

§ 203. **Ownership of Water Carriers by Railroads.**—The Panama Canal Act makes it unlawful after July 1, 1914, for "any railroad company or other common carrier subject to the act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense."

Jurisdiction was given the Commission after hearing "to determine questions of fact as to the competition or possibility of competition." This determination was authorized to be made on the application of the carrier, or shipper, or on the initiative of the Commission itself, and in all cases the Commission's order is final.<sup>61</sup>

If an "existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people," and if "such extension will neither exclude, prevent, nor reduce competition on the route by water," the Commission may extend the time beyond July 1, 1914, under the conditions prescribed in the statute.<sup>62</sup>

The principles upon which the Commission has acted in determining applications under this statute were stated in

Cases, 234 U. S. 476, 58 L. Ed. 1408, 34 Sup. Ct. 986; Sec. 154, *ante*.

61. Act August 24, 1912; Secs. 353, 354, *post*.

62. Act August 24, 1912; Sec. 355, *post*.

Application of Southern Pacific Co. in re Operation of Steamship Company."

§ 204. **The Commission's Duty with Reference to Schedule of Rates.**—It is the duty of all common carriers subject to the Act to Regulate Commerce to file with the Commission, print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation both on their own line and over other lines, pipe lines and water connections with which they have established a through route and joint rates. Changes in these schedules cannot be made without thirty days' notice; but the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein provided, or modify the requirements of this section in respect to publishing, posting, and filing tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions. The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged, and may change the form from time to time as shall be found expedient.

Under the power given with respect to the schedules of rates to be charged by common carriers it issues administrative orders from time to time.

Carriers are prohibited from engaging or participating in interstate transportation "unless the rates, fares, and charges \* \* \* have been filed and published" as provided by the statute.

The Commission has power to reject tariffs under certain conditions," and those so rejected are void.

Tariffs provisions relating to interchangeable mileage tickets must likewise be published."

Discrimination was one of the evils most complained of prior to the original Act to Regulate Commerce and since,

63. Sec. 355, and see Application S. P. Co. re Operation S. S. Co., 32 I. C. C. 692. S. P. Co. Ownership of Oil Steamers, 34 I. C. C. 377; Steamer Lines on Chesapeake Bay, 35 I. C. C. 692. and see *post* section 353 and annotations.

64. Sec. 6 of Act; Secs. 364 and 366, *post*; Brown & Sons Lumber Co. v. L. & N. R. Co., 37 I. C. C. 507, 509.

65. Sec. 22 of Act; Sec. 444, *post*.

and that Act and the supplemental and amendatory Acts have been framed to afford an effective means for reducing the wrongs resulting from unjust discrimination and undue preference. One of the means of effectuating this purpose, is that of placing upon all carriers the positive duty of establishing, filing and publishing schedules of reasonable rates with a uniform application and of a definite meaning, and of maintaining and collecting such rates so long as they remain unaltered in the manner provided by law."

Where the tariff shows no joint through rate, carriers parties to a through bill of lading must collect the sum of the local rates shown by the local tariffs."

Where an agent of a carrier gives a shipper a rate less than that prescribed in the legally filed tariff, the shipper must nevertheless pay the full tariff rate," and a rate in a bill of lading less than the tariff rate will not relieve a shipper from paying the tariff rate the shipment being interstate, although the statute of the state in which the bill of lading was issued made it illegal to collect a higher rate than was on the bill of lading specified." That a schedule of rates has been duly filed will not prevent the Commission from declaring such rates unreasonable and awarding reparation for the amount charged and collected in excess of what was a reasonable rate."

66. *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350; *Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Com. Com.*, 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700, 5 I. C. R. 391, 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896.

67. *United States v. New York C. & H. R. R. Co.*, 212 U. S. 509, 53 L. Ed. 629, 29 Sup. Ct. 313.

68. *Texas & Pac. Ry. Co. v. Mugg*, 202 U. S. 242, 50 L. Ed. 1011, 26 Sup. Ct. 628; *Illinois C. R. Co. v. Henderson Elevator Co.*, 226 U. S. 441, 57 L. Ed. 290, 33 Sup. Ct. 176; *Kansas City Sou. Ry. Co. v. Albers Com. Co.*, 223

U. S. 573, 56 L. Ed. 556, 32 Sup. Ct. 316; *New York C. & H. R. R. Co. v. United States*, 212 U. S. 500, 53 L. Ed. 624, 29 Sup. Ct. 309; but the Act of 1910 provides a penalty for misquoting a rate, Sec. 180, *ante*, Secs. 205, 212, and 368, *post*.

69. *Gulf C. & S. F. Ry. Co. v. Hefley*, 158 U. S. 98, 39 L. Ed. 910, 15 Sup. Ct. 802; *Spratlin v. St. L. & S. W. Ry. Co.*, 76 Ark. 82, 88 S. W. 836; *St. L. & S. W. Ry. Co. v. Carden*, 34 S. W. (Tex) 145.

*Galley* 181 26367. *Templeton*,

70. *Nicola, Stone & Myers Co. v. Louisville & N. R. Co.*, 14 I. C. C. R. 199, 204.

Transportation Act 1920<sup>71</sup> requires common carriers "by water in foreign commerce whose vessels are registered under the laws of the United States" to file certain schedules and authorizes the Commission to make "rules and regulations with respect thereto."

§ 204. A. **Bills of Ladings.**—In a comprehensive and able opinion Mr. Commissioner Wooley in announcing the judgment of the Commission, after quoting parts of Sections 12, and 15 of the Interstate Commerce Act, said:<sup>72</sup> "Thus the Commission has power and authority under the Act to determine the reasonableness of rules, regulations, and practices of the carriers, and to require them to cease and desist from the enforcement of rules and regulations, and the continuance of practices found to be unreasonable or unjustly discriminatory, or unduly prejudicial. And herein lies the Commission's power to lay hands upon the 'issuance, form and substance' of bills of lading. The act specifically requires carriers subject thereto to issue bills of lading. The Commission has undoubted authority to enforce this requirement in a proper proceeding. It can require carriers to file with it the rules and regulations which they write into their bills of lading. It can, by due process, require that uniform rules and regulations be adopted by carriers subject to its jurisdiction. It can determine whether such are, in and of themselves, or as interpreted in the practices of the carriers, reasonable and nondiscriminatory, and, if otherwise, condemn them and prescribe reasonable rules and regulations, in which event the carriers must obey."

It is believed that this conclusion is sound, although a District Court of the United States has held otherwise.<sup>73</sup> The issue is now before the Supreme Court.<sup>74</sup>

The statute penalizing the forgery of interstate and foreign bills of lading, confers no jurisdiction on the Commission, but the decision holding that such statute is constitutional sup-

71. Transportation Act, Sec. 441; Int. Com. Act, Sec. 25, paragraphs 1 to 5; Sections 446a to 446e, *post*.

72. Bills of Lading, 52 I. C. C. 671, 686.

73. Alaska S. S. Co. v. United States, 259 Fed. 713.

74. United States v. Alaska Steamship Co., 251 U. S. —, 64 U. S. —, 40 Sup. Ct. —.

ports the contention that Congress could, as it did in sections of the Interstate Commerce Act referred to above, commit authority to the Commission to regulate the form of such contracts."<sup>75</sup>

The Commission in the Bills of Lading Case held that under the Cummins Amendment, which in this respect is unchanged by the Transportation Act 1920, the shipper's measure of recovery for loss or damage to his freight is based on the value of the property at the point where the contract requires its delivery. That such is the law has been held by a District and Circuit Court of Appeals of the United States<sup>76</sup> and the Supreme Court by refusing an application for writ of certiorari approved the decision of the Circuit Court of Appeals.

§ 205. **Damages.**—In addition to the public penalties prescribed by the Act, a carrier is liable to any person or persons injured by its violation of the Act for the full amount of damages sustained in consequence of such violation, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery. The only damages recoverable under this Act by application to the Commission are damages, for a violation of the provisions thereof, consequently the Commission has no jurisdiction to award damages for breach of contract by a carrier. The Commission has no jurisdiction to award damages against a shipper, nor can a carrier set off a claim for undercharges or other damages against the claim of a shipper for reparation."<sup>77</sup>

75. *United States v. Ferger*, 250 U. S. 199, 207, 63 L. Ed. 609, 612, 39 Sup. Ct. 445, 447.

76. Note 72 *supra*, and *McCaull-Dinsmore Company v. Chicago, M. & St. P. Ry. Co.*, 252 Fed. 664; *Chicago M. & St. P. Ry. Co. v. McCaull-Dinsmore Co.*, 260 Fed. 835, — C. C. A. —; affirmed 251 U. S. —, 64 L. Ed. —, 40 Sup. Ct. —.

77. *Lanning-Harris C. & G. Co. v. St. Louis & S. F. R. Co.*, 15 I. C. C. 37, 38; *Falls & Co. v. Chicago, Rock Island & P. Ry. Co.*, 15 I. C. C. 269, 273; *Dun-*

*can v. Atchison, T. & S. F. Ry. Co.*, 6 I. C. C. 85, 4 I. C. R. 385; *Carstens Packing Co. v. Oregon R. & N. Co.*, 17 I. C. C. 125; *Blume & Co. v. Wells-Fargo & Co.*, 15 I. C. C. 53; damage caused by delay; *Shiel & Co. v. Illinois Cent. R. Co.*, 12 I. C. C. 210, breach of contract; *LaSalle & B. Co. v. Chicago & N. W. R. Co.*, 13 I. C. C. 610; *General Electric Co. v. New York C. & H. R. R. Co.*, 14 I. C. C. 237, breach of contract; *Colorado Fuel Co. v. M. K. & T. Ry. Co.*, 39 I. C. C. 491, 493; *Southwestern Portland Cement Co. v. T. & P. Ry.*

The language of the statute is broad and makes the carrier liable for damages sustained in any case where such carrier does or causes to be done any act, matter, or thing, prohibited or declared unlawful by the statute. Such liability exists when there is a failure to do any act, matter, or thing, required by the law."<sup>78</sup>

The foregoing right stated in section 8 of the Act in so far as it permits a recovery of damages for an unlawful charge was not created by the section, although some uncertainty as to the full extent of the right was removed by the statute. In England it had been held that a shipper paying a reasonable rate could not recover damages because of a discriminatory rate favoring another," but in this country the weight of authority was the other way. The statute removed any doubt which might have existed on the subject."<sup>79</sup> The amount of recovery is stated in the statute to be the "full amount of damages sustained," which is not different from the common law measure of damages in cases where damages are recoverable. "The right to recover," as said by the Supreme Court, "is limited to the pecuniary loss suffered and proved."<sup>80</sup>

§ 206. **Damages—Power of the Commission to Make Award of.**—Any person or persons claiming to be damaged by any common carrier subject to the provisions of the Act to Regulate Commerce may make complaint to the Commission," by petition which shall briefly state the facts. After service and hearing of which" it shall be the duty of the Commission to

Co., 41 I. C. C. 39, 40; Pacific Creamery Co. v. Sou. Pac. Co., 42 I. C. C. 93, 100; Trexler Lumber Co. v. Sou. Ry. Co., 42 I. C. C. 719; Galloway Co. v. G. B. & W. R. Co., 48 I. C. C. 455, 456; Wilson v. P. R. Co., 50 I. C. C. 571, who liable for under charges; Pittwood v. N. P. Ry. Co., 51 I. C. C. 535.

78. Sec. 8 of the Act; Sec. 382, *post*.

79. Great Western R. Co. v. Sutton L. R., 4 H. L. 238, 38 L. J.

Exch. N. S. 177, 22 L. T. N. S. 43, 18 Week. Ref. 92.

80. Parsons v. Chicago & N. W. R. Co., 167 U. S. 447, 42 L. Ed. 231, 17 Sup. Ct. 887; Pennsylvania R. Co. v. International Coal Mining Co., 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893.

81. Cases noted *supra* and, Knudsen-Ferguson Fruit Co. v. Michigan Cent. R. Co., 149 Fed. 973, 79 C. C. A. 483; St. Louis, S. W. R. Co. v. Lewellen, 192 Fed. 540.

82. Sec. 9 of Act; Sec. 383, *post*.

83. Sec. 13 of Act; Sec. 392, *post*.

make a report in writing in respect thereto, which shall state the conclusions of the Commission together with its decision, order or requirement in the premises, and such report shall, when there is an award of damages, include the findings of fact on which the award is made."

When the Commission shall determine that any party complainant is entitled to an award of damages, it shall make an order directing the carrier to pay the complainant the sum to which he is entitled on or before a day named. These findings of fact and the order based thereon are *prima facie* evidence of the facts therein stated."

Prior to the Amendment of March 2, 1889, the Commission held that a claim for damages "presents a case at common law in which the defendants are entitled to a jury trial," and under the then law awards for damages were not made." Since the Amendment to section 16, awards may be made."

Of these provisions for award of damages, it has been said:

"As to the provisions covering reparation cases, Congress is no longer dealing with those matters which concern the practical management and conduct of the business of carriers and the regulation thereof *in futuro*, in the interests of the public generally, but is conferring a private right of action upon those who have suffered actual damage, by reason of such carriers' violation of some requirement of the Act. The conferring of such right of action, though incident to its power to regulate commerce, is not a regulation thereof. It makes redress of a private injury, actually suffered, possible. It concerns the past and not the future conduct of the carrier, and, though this right of action for damages is qualified by making it dependent in certain cases upon the precedent award of reparation by the Commission, such award is not of the nature of the administrative functions conferred on that

84. Sec. 14 of Act; Sec. 394, *post*.

85. Sec. 16 of Act; Sec. 407, *post*.

86. *Heck v. East Tennessee, Va. & Ga. Ry. Co.*, 1 I. C. C. 495, 1 I. C. R. 775; *Riddle v. New York, L. E. & W. R. Co.*, 1 I. C. C. 594, 1 I. C. R. 787; *Lehigh Valley R. Co. v. Clark*, 207 Fed. 717, 720,

125 C. C. A. 235; Note 77 below.

87. *Rawson v. Newport N. & M. V. R. Co.*, 3 I. C. C. 266, 2 I. C. R. 626; *MacLoon v. Chicago & N. W. R. Co.*, 5 I. C. C. 84, 3 I. C. R. 711, and practice of the Commission since.

body." In reversing the Circuit Court of Appeals the Supreme Court without discussing the principles quoted found that the report of the Commission conformed to the statute. Misrouting violates the laws and damage suffered may be awarded by the Commission."

§ 207. **Awards of Damages for Charging an Unjust and Unreasonable Rate.**—The statute provides that charges subject to the Act must be "just and reasonable." When this law is violated the Commission may make an "award of damages." The Circuit Court of Appeals held that before such an award can be made there must be a finding that the rate charged was unreasonable and the Commission must prescribe "a reasonable maximum rate to be observed by all," and "an order of reparation without such establishment of a reasonable maximum rate is beyond the power of the Commission and void." This decision was reversed by the Supreme Court in an opinion written by Mr. Justice Lamar who said:"

"But however desirable it may have been to deal with the entire matter at one time, the joinder of the two subjects was not jurisdictional. There was no such necessary connection between the two as to make the order of reparation void because of the absence of a concurrent provision establishing a rate for the future."

When a rate is advanced and the increased rate is condemned the shipper, having the legal right to have transportation at a reasonable rate, is clearly entitled to an award of damages by way of reparation measured by the amount paid

88. *Lehigh Valley R. Co. v. Clark*, 207 Fed. 717, 723, 125 C. C. A. 235, District Court affirmed except as to a portion of the attorney's fees, and Circuit Court of Appeals reversed, *Mills v. Lehigh V. R. Co.*, 238 U. S. 473, 59 L. Ed. 1414, 35 Sup. Ct. 888.

89. *McCaull-Dinsmore Co. v. Chicago G. W. Ry. Co.*, 14 I. C. C. 527; *Gus Momsen & Co. v. Gila Valley, G. & N. Ry. Co.*, 14 I. C. C. 614; *Goodman Mfg. Co. v. Pennsylvania R. Co.*, 26 I. C. C.

423; *Newman Lumber Co. v. Mississippi C. R. Co.*, 26 I. C. C. 97; Sec. 15 of Act; Sec. 402, *post*.

90. Sec. 1 of Act; Sec. 339, *post*.

91. *Denver & R. G. R. Co. v. Baer Bros. Mer. Co.*, 187 Fed. 485, 109 C. C. A. 337; *Commercial Club of Omaha v. A. & S. Ry. Co.*, 27 I. C. C. 302, 314.

92. *Baer Bros. Mer. Co. v. Denver & R. G. R. Co.*, 233 U. S. 479, 58 L. Ed. 1055, 34 Sup. Ct. 641.

in excess of the rate found to be unreasonable." Where, however, complaint is made of a rate already in existence and such rate is declared unreasonable at the date of the order of the Commission, a different question is presented. At what exact time did the rate become reasonable? Discussing this question in the *Anadarko Cotton Oil Co. case*," the Commission said: "The Commission is not justified in awarding damages in any case except on a basis as certain and definite in law and in fact as is essential to the support of a final judgment or decree requiring the payment of a definite sum of money. \* \* \* The test of reasonableness can be applied only by reference to and upon consideration of all pertinent facts, circumstances, and conditions affecting the rate in effect at any particular time. \* \* \* A rate reasonable in view of the circumstances and conditions when it is established may in course of time become unreasonable by virtue of changed circumstances and conditions. It is manifestly impractical for the carriers or the Commission in such a case to determine at what exact time in the gradual process of changes the rate becomes unreasonable."

In the *Burnham-Hanna-Munger case*," no reparation was awarded for shipments moving prior to the date of the order, but awards were made for shipments moving after that date and during the time the order was enjoined. After two years from the date of the order therein advances were made some of which were held to increase rates to a point where they were unreasonable. In determining the question arising in an

93. *Tift v. Southern Ry. Co.*; 10 I. C. C. 548; *Tift v. Southern Ry. Co.*, 138 Fed. 753; *Southern Ry. Co. v. Tift*, 148 Fed. 1021; *Southern Ry. Co. v. Tift*, 206 U. S. 428, 51 L. Ed. 1124, 27 Sup. Ct. 709; *Nicola, Stone & Myers Co. v. Louisville & N. R. Co.*, 14 I. C. C. 199; *Central Yellow Pine Assn. v. Illinois Cent. R. Co.*, 10 I. C. C. 505; *Illinois Cent. R. Co. v. Interstate Com. Com.*, 206 U. S. 441, 51 L. Ed. 1128, 27 Sup. Ct. 700; *Russe & Burges v.*

*Interstate Com. Com.*, 193 Fed. 678, Op. Com. Ct. No. 18 p. 311; *Chicago, B. & Q. R. Co. v. Feintuch*, 191 Fed. 482, 112 C. C. A. 126.

94. *Anadarko Cotton Oil Co. v. Atchison, T. & S. F. Ry. Co.*, 20 I. C. C. 43, 49, 50, 51.

95. *Burnham-Hanna-Munger Dry Goods Co. v. Chicago, R. I. & P. Ry. Co.*, 14 I. C. C. 299, order enjoined in *Chicago, R. I. & P. Ry. Co. v. Interstate Com. Com.*, 171 Fed. 680, and the Commission

investigation of these increases the Commission said: "We are now prescribing what may well be considered a new rate adjustment," and under such conditions reparation was denied."

The Commission having found a rate unreasonable from the date of that order, reparation should be allowed, the Commission saying: "In every case like this the Commission must fix the point of time at which the rate becomes unreasonable, must determine when shippers were entitled, and when carriers ought to have established the rate found reasonable. Manifestly each case must depend upon its own facts, and the complainant must assume the burden of showing that the rates paid have been unreasonable." "

When a shipper owning a commodity employs a common carrier to transport it, it is his right to have such transportation at a reasonable charge. If the carrier exacts more than a reasonable charge, the shipper's rights have been invaded to the extent that the charge exacted exceeds a reasonable one. The shipper is entitled to have his injury wiped out by a return to him of the amount paid in excess of what he was lawfully bound to pay. This is the measure of his minimum recovery. Under some circumstances this amount may be augmented to recoup the shipper for the loss of his business maliciously caused by the common carrier .

This rule has not been consistently followed by the Commission. In some cases reparation has been denied, as in the Anadarko Cotton Oil Case, *supra*, because there was a general readjustment of rates. In other cases rates have been held unreasonable, but although the facts remained unchanged for two years prior to the order, reparation was denied or dated from some date other than that prescribed in the statute of limitations. The later decisions of the courts have refused so to limit a shipper's rights and sustained the rule as given above."

sustained in Interstate Com. Com. v. Chicago, R. I. & P. Ry. Co., 218 U. S. 88, 54 L. Ed. 946, 30 Sup. Ct. 651.

96. Re Advances in Rates between Mississippi and Missouri Rivers, 21 I. C. C. 546.

97. Re Wool, Hides and Pelts, 25 I. C. C. 675, 678; National Wool Growers Assn. v. Oregon S. L. R. Co., 23 I. C. C. 151.

98. The principle is settled by the courts: Southern Pac. Co. v. Darnell-Taenzler Lumber Co., 245

And reparation may be ordered for an unreasonable charge although no tariff is provided therefor."

Damages may be awarded "where a carrier collects a greater sum on an intermediate shipment than is fixed by its published tariffs."<sup>99</sup>

"Damages" and "Reparation" have been used interchangeably in the reports of the Commission, although in the later volumes the word damages is generally adopted.

§ 208. **Awards of Damages for Unlawful Discrimination.**—Sections two<sup>101</sup> and three<sup>102</sup> of the Act prohibit unjust dis-

U. S. 531, 62 L. Ed. 451, 38 Sup. Ct. 186. (For the history of this case see 13 I. C. C. 668, 190 Fed. 659, 221 Fed. 890, 137 C. C. A. 460, 229 Fed. 1022, 143 C. C. A. 663); N. Y. N. H. & H. R. Co. v. Ballou & Wright, 242 Fed. 862, 155 C. C. A. 450, P. U. R. 1918A, 149. See as illustrating the lack of a definite adherence to the rule stated in the text: Rules unreasonable but reparation denied; Hires Condensed Milk Co. v. P. R. Co., 38 I. C. C. 441 and cases cited 448; Scott v. Cape Charles R. Co., 38 I. C. C. 467; Brick from New Hampshire, 42 I. C. C. 231; Arlington Heights Fruit Exchange v. Sou. Pac. Co., 39 I. C. C. 88, 45 I. C. C. 248, 250; Coca-Cola Co. v. A. T. & S. F. Ry. Co., 45 I. C. C. 461. Reparation denied because general system of rates involved: Western Gro. Co. v. B. & O. R. Co., 40 I. C. C. 53 and cases cited p. 55; Alleged Unreasonable Rates on Live Stock, 41 I. C. C. 514 and cases cited; Cudahy Packing Co. v. A. T. & S. F. Ry. Co., 42 I. C. C. 579; Delaware, etc. Coal Co. v. D. L. & W. R. Co., 46 I. C. C. 506 and cases cited. Reparation granted: Federal Glass Co. v. C. R. I. & P. Ry. Co., 38 I. C. C. 331; Fruit Despatch

Co. v. P. & R. Ry. Co., 48 I. C. C. 634; Cotton Mfrs. Assn. v. C. C. & O. Ry. Co., 53 I. C. C. 741. General statement of claim sufficient: Morgan's L. & T. R. & S. Co. v. Joseph Iron Co., 243 Fed. 149; Commercial Club of Omaha v. A. & S. Ry. Co., 41 I. C. C. 480, cases cited 482; But some certainty is required, A. T. & S. Ry. Co. v. Spiller, 246 Fed. 1, 158 C. C. A. 227, 249 Fed. 677; Montgomery v. C. B. & Q. R. Co., 228 Fed. 616. Injury to business: Louisville & N. R. Co. v. Ohio Valley Tie Co., 242 U. S. 288, 61 L. Ed. 305, 37 Sup. Ct. 120. No defense that shipper adds freight to selling price: Nitro Powder Co. v. W. S. R. Co., 44 I. C. C. 596, 597; Ballou & Wright Case, *supra*, this note.

99. Laning-Harris Coal & Grain Co. v. St. Louis & S. F. R. Co., 15 I. C. C. 37; Wheeler Lumber, Bridge & Supply Co. v. Astoria & C. R. Co., 20 I. C. C. 10.

100. Memphis Freight Bureau v. Kansas C. S. Ry. Co., 17 I. C. C. 90; Hampton Mnfg. Co. v. Old Dominion Steamship Co., 27 I. C. C. 666, 668.

101. *post*, Sec. 345.

102. *post*, Sec. 346.

crimination and undue or unreasonable preference. When these sections are violated the transgressing carrier is liable to the "person or persons injured thereby for the full amount of damages sustained in consequence of any such violation."<sup>103</sup>

The jurisdiction of the Commission to make an award of damages in discrimination cases was at one time denied in an opinion by a bare majority of the commissioners,<sup>104</sup> but the courts having decided otherwise, the Commission now exercises jurisdiction over claims for such awards.<sup>105</sup> That such jurisdiction exists cannot now be doubted.<sup>106</sup>

In the Coal Car Supply cases shippers were damaged by being prevented from selling coal as a result of discrimination against them in furnishing cars. This discrimination was found illegal and the carriers ordered to desist therefrom.<sup>107</sup> Subsequently, and after the courts had held that the Commission had jurisdiction so to do, the Commission heard

103. Sec. 8 of Act; Sec. 382, *post*

104. *Joynes v. Pennsylvania R. Co.*, 17 I. C. C. 361.

105. *Hillsdale Coal & Coke Co. v. Pennsylvania R. Co.*, 23 I. C. C. 186.

106. Dissenting Opinion of Commissioner Lane in *Joynes v. Pennsylvania R. Co.*, 17 I. C. C. 361, *et seq.*; *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 176 Fed. 748; *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 183 Fed. 929, 106 C. C. A. 269. affirmed, same styled Case, 230 U. S. 304, 57 L. Ed. 1474, 33 Sup. Ct. 938; *Baltimore & O. R. Co. v. United States (Pitcairn Case)*, 215 U. S. 481, 54 L. Ed. 292, 30 Sup. Ct. 164; *Robinson v. Baltimore & O. R. Co.*, 222 U. S. 506, 56 L. Ed. 288, 32 Sup. Ct. 114, affirming same styled case, 64 W. Va. 406, 63 S. E. 323. Mr. Justice Pitney in his dissenting opinion in *Pennsylvania R. Co. v. International Coal Mining Co.*,

230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893, 914, 915, appends a list of cases where the Commission had granted reparation for unlawful charges "because discriminatory, irrespective of whether they were otherwise extortionate," because "in excess of rate afterward voluntarily established by the carrier" because of error in routing," because "rates held unreasonable per se," "unreasonable because higher than obtainable by another route," and "because of exceeding the sum of the locals," see pages 242 and 243 of opinion.

107. *Hillsdale Coal & Coke Co. v. Pennsylvania R. Co.*, 19 I. C. C. 356; *Jacoby v. Pennsylvania R. Co.*, 19 I. C. C. 392; *Bulah Coal Co. v. Pennsylvania R. Co.*, 20 I. C. C. 52, order sustained, *Pennsylvania R. Co. v. Interstate Com. Com.*, 193 Fed. 81; *Opinion Com. Ct. No. 31*, p. 275.

evidence, determined the amount of damages suffered and entered an award therefor in favor of the shippers.<sup>108</sup>

The jurisdiction is settled, but the difficult question is one of proof. What must be shown to establish the fact of the damage? In the *International Coal Mining* case,<sup>109</sup> damage was claimed because the defendant carrier had rebated part of the published rate to a competitor of the plaintiff. The discrimination resulting from a less charge than that prescribed in a legally filed tariff, no prior action by the Commission was necessary to give the courts jurisdiction. In the Supreme Court, the shipper contended that it was unnecessary to allege or prove that it had suffered an injury, for the reason that, as a matter of law, it was entitled to recover as damages the same rate per ton on all its shipments as had been paid by any other person, on his tonnage shipped at the same time over the same route. There was "neither allegation nor proof that it (plaintiff) suffered any injury." What plaintiff there claimed was its right to receive the same rebate which had been paid its competitor. The pleadings, the evidence and this contention must not be lost sight of in considering the opinion of a majority of the court in denying such contention. Delivering the opinion of the court, Mr. Justice Lamar said:

"Making an illegal undercharge to one shipper did not license the carrier to make a similar undercharge to other shippers. \* \* \* The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. These damages might be the same as the rebate or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered."

The case was remanded for a new trial, and all that the opinion holds is that a plaintiff's rights are not measured by the benefits another shipper receives, but are measured

108. *Hillsdale Coal & Coke Co. v. Pennsylvania R. Co.*, 23 I. C. C. 186. See also, *Hillsdale Coal & Coke Co. v. Pennsylvania R. Co.*, 229 Pa. 61, 78 Atl. 28.

109. *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893, reversing *Pennsylvania R. Co. v. International Coal Mining Co.*, 173 Fed. 1, 97 C. C. A. 383.

by the actual damages he suffers, proof of which damages must be made as in other suits therefor.

The Commission held that rates on tobacco for export were discriminatory in violation of the Act, and entered an order requiring the carriers to desist from such discrimination, but made no finding that the rate was unreasonable in violation of section one.<sup>110</sup> On a supplemental hearing, complainants sought to recover an award of damages. On such hearing it appeared that the complainants shipped to foreign ports other than those to which the shippers in whose favor the discrimination existed shipped, and no evidence of damages was offered. It was contended that an award should be made of the difference between the rate paid by complainants and that paid by other shippers shipping to points to which complainants made no shipments. The Commission denied reparation, but its opinion should be construed as limited by the facts of the case.<sup>111</sup> In a later case involving the same principle, the Commission stated the rule as follows:

"Reparation may properly be awarded when a discriminatory freight rate has been exacted, but it does not necessarily follow that because a rate is found to be unjustly discriminatory and unduly prejudicial, that the complaining parties are the ones who have been damaged through its exaction."<sup>112</sup>

That it may be difficult to prove damages is no reason for denying the right thereto if the damages are reasonably certain and can be proved with reasonable exactitude.<sup>113</sup>

In awarding general damages, the courts meet with the same difficulty and the rules for fixing other kinds of damages should apply when a shipper is damaged by a rate illegally discriminatory against him. The Meeker case<sup>114</sup> is decisive

110. *New Orleans Board of Trade v. Illinois Cent. R. Co.*, 29 I. C. C. 465.

111. *New Orleans Board of Trade v. Illinois Cent. R. Co.*, 29 I. C. C. 32.

112. *Curry & Whyte Co. v. Duluth & I. R. R. Co.*, 30 I. C. C. 1, 14. See also *Becker v. Pere Marquette R. Co.*, 28 I. C. C. 645, 657.

113. *Weinman v. De Palma*, 232 U. S. 571, 58 L. Ed. 733, 34 Sup. Ct. 370.

114. *Meeker v. Lehigh Valley R. Co.*, 21 I. C. C. 129, 23 I. C. C. 480, 211 Fed. 785, 128 C. C. A. 311, 236 U. S. 412, 434, 59 L. Ed. 644, 659, 35 Sup. Ct. 328, 337. See also *Mills v. Lehigh V. R. Co.*, 238 U. S. 473, 59 L. Ed. 1414, 35 Sup. Ct. 888; *So. Pac.*

only of the question of the *prima facie* effect of an order of the Commission. In that case the Commission had awarded damages both for a violation of section one and of section three of the act. The carrier being sued presented no testimony but relied on the claim that the report of the Commission showed that the amount of the award corresponded in one instance to the amount of the rebate and in the other to the amount of the overcharge, and that therefore the Commission had applied an erroneous and inadmissible measure of damages. To this contention the Supreme Court replied: "The Commission was authorized and required by section 8 of the act to regulate commerce to award the full amount of damages sustained, and that, of course, was to be determined from the evidence. If it showed that the damage corresponded to the rebate in one instance and to the overcharge in the other, the claimant was entitled to an award upon that basis. The case of *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. Rep. 893, is cited as holding otherwise, but it does not do so. There a shipper, without proving that he sustained any damage, sought to recover from a carrier for giving a rebate to another shipper, and this court, referring to section 8, said (p. 203): "The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved, they could not be recovered. Whatever they were they could be recovered." There is nothing in either report of the Commission which is in conflict with what was said in that case. On the contrary, the plain import of the findings is that the amount awarded represents the claimant's actual pecuniary loss; and, in view of the recital that the findings were based upon the evidence adduced, it must be presumed, there being no showing to the contrary, that they were justified by it."

*Co. v. Goldfield Consol. Milling & Transportation Co.*, 220 Fed. 14; *Darnell-Taenzer Lumber Co. v. So. Pac. Co.*, 221 Fed. 890, 137 C. C. A. 460, reversing 190 Fed. 659. As misconstruing the *International Coal case supra*, see *Lehigh V. R. Co. v. Clark*, 207 Fed. 717, 125 C. C. A. 235, reversed in *Mills Case supra*; *Le-*

In the case of *Mills v. Lehigh Valley R. Co.*, note *supra*, the Commission found that the complainant was entitled to a stated amount "as reparation."<sup>115</sup> It was contended that such a finding was not equivalent to a finding that he was damaged. Of this contention the Court said: "What the Commission decided was that the shippers were entitled to reparation; that is, to be made whole,—to be compensated for a loss because of an illegal and unreasonable exaction; and the amount which they stated as the sum to be paid 'as reparation' on the specified shipments was the amount which they found necessary to accomplish the reparation,—to afford the compensation. The statute was not concerned with mere forms of expression, and in view of the decision that a finding of the ultimate fact of the amount of damage is enough to give the order of the Commission effect as *prima facie* evidence, we think that the trial court did not err in its ruling. The statutory provision merely established a rule of evidence. It leaves every opportunity to the defendant to contest the claim. But when the Commission has found that there was damage to a specified extent, *prima facie* the damage is shown; and, according to the fair import of its decision, the Commission did find the amount of damage in this case."

A shipper's damages as the authorities now stand are not ordinarily measured by the difference between the rate paid by him and a lower and unlawfully preferential rate paid by his competitor. In such cases the shipper must be able to show just wherein and to what extent he has been damaged. There are many cases in the reports of the Commission in which reparation has been disallowed under the authority of the *International Coal case*, *supra*, solely because the complainant failed to offer the necessary proof, and that in cases where the proof existed. It may be said that the business charged an unlawful rate in violation of sections 2 or 3 of the Act to Regulate Commerce may be seriously injured without any shipment having moved under such unlawful rate. To prove this and other injuries, and to measure

*high V. R. Co. v. American Hay*  
Co., 219 Fed. 539, 135 C. C. A.  
307.

115. *Naylor & Co. v. Lehigh V.*  
*R. Co.*, 15 I. C. C. 9, 18 I. C. C.  
624.

the amount necessary to repair the injury, the same principles that the courts are constantly applying to suits for injuries to business, must be brought into action.<sup>116</sup>

§ 209. **Damages under the Fourth Section.**—Under section four of the Act, as has been shown,<sup>117</sup> relief may be granted from the long and short haul provision, and the Commission has granted relief from the provision requiring that the rate for the through routes shall not exceed the aggregate of the intermediate rates.

Under these circumstances, where the carrier has followed the statute and applied for relief, the existing rate for the shorter haul is the legal rate until adjudged otherwise by the Commission after hearing. Until such adjudication the carrier has not “done any act, matter or thing \* \* \* prohibited or declared to be unlawful,” nor has there been an omission to “do any act, matter or thing” required to be done. Discussing the question and of the applications filed for relief under the section, the Commission said:

“Under this provision over 11,000 applications were filed before the date fixed, and these two applications were among that number. Now, we think that it plainly appears, from

116. *Graustein v. B. & M. R. R. Co.*, 45 I. C. C. 393. Recent cases discussing the general principles are: *Manufacturers & Merchants Asso. v. A. & A. R. R. Co.*, 37 I. C. C. 350, 351; *California Corrugated Culvert Co. v. A. G. S. R. R. Co.*, 38 I. C. C. 568; *Greenbaum v. Sou. Ry. Co.*, 38 I. C. C. 715; *Brooks Coal Co. v. Wabash Ry. Co.*, 39 I. C. C. 426; *Wilkes & Company v. A. G. S. R. R. Co.*, 39 I. C. C. 447; *Union Lumber Co. v. G. C. & S. F. Ry. Co.*, 41 I. C. C. 411; *Omaha Alfalfa Milling Co. v. U. P. R. R. Co.*, 43 I. C. C. 264; and *Delaware, L. & W. Coal Co. v. R. R. Co.*, 46 I. C. C. 506, where the Commission did what was designated as “substantial” and “essential” justice.

That it is possible to make proof sufficient to obtain an order for damages for charging a discriminatory rate appears from the following cases: *Pittsburg Steel Co. v. P. & L. E. R. R. Co.*, 39 I. C. C. 312; *McGowan-Foshee Lumber Co. v. F. A. & G. R. R. Co.*, 43 I. C. C. 581; *Valley Smokeless Coal Co. v. P. R. R. Co.*, 43 I. C. C. 654; *Buffalo Union Furnace Co. v. L. S. & M. S. Ry. Co.*, 44 I. C. C. 267; *Penn. R. Co. v. Minds*, 250 U. S. 368, 63 L. Ed. 665, 39 Sup. Ct. 531; *Penn. R. Co. v. Stineman Coal Min. Co.*, 242 U. S. 298, 61 L. Ed. 316, 37 Sup. Ct. 118; *Penn. R. Co. v. Jacoby & Co.*, 242 U. S. 89, 61 L. Ed. 165, 37 Sup. Ct. 49.

117. *Ante* Secs. 154, 155; *post*. Section 349.

the action of Congress in providing that no carrier should be proceeded against for a violation of the fourth section until its application had been acted upon, that it was the intent of Congress to say that matters should be left *in statu quo* until that time. It would be inconsistent to grant reparation for a disregard of the rule of the fourth section during that period within which the law-making authority had expressly sanctioned existence of such disregard.

"Without undertaking, therefore, to lay down any rule as to the granting of reparation for violations of the fourth section, we hold that no damages can be given up to the time when the Commission passes upon these fourth section applications, unless, possibly, a case is made out under the third section, which might carry with it an award of damages, or unless under the first section the rate to the intermediate point has been found unreasonable." <sup>118</sup>

The Commission has with practical unanimity and in hundreds of cases awarded reparation where through rates have exceeded the aggregate of the intermediate clause of the fourth section. <sup>119</sup>

§ 210. **Damages for Misrouting.**—The law prior to 1920 stating the shippers' rights provided: "subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and

118. *Appalachian Lumber Co. v. Louisville & N. R. Co.*, 25 I. C. C. 193, 197, followed in *Jonesville Clothing Co. v. Chicago & N. W. Ry. Co.*, 26 I. C. C. 628, 630.

119. Section 154, *supra*. *Lindsay Bros. v. B. & O. S. W. R. Co.*, 16 I. C. C. 6, 8; *Windsor Turned Goods Co. v. C. & O. Ry. Co.*, 18 I. C. C. 162, 164; *Alabama Packing Co. v. L. & N. R. Co.*, 47 I.

C. C. 524, 529; *Lust's Digest*, Vol. 1, p. 864, *et seq.*, for several hundred cases. If the long-and-short haul provision were absolute, reparation should be awarded for its violation. *Sou. Pac. Co. v. California Adjustment Co.*, 237 Fed. 954, 150 C. C. A. 604, 248 U. S. 595, 63 L. Ed. 226, 39 Sup. Ct. 182.

deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: Provided, however, that the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported.”<sup>120</sup>

Under the authority granted by the statute, the Commission passed certain conference rulings in which it is stated that it has exclusive jurisdiction over claims for damages arising from the misrouting of freight.<sup>121</sup> Carriers could not disregard instructions of shippers as to intermediate routing, except when the tariff of the initial line reserved the right to the carrier to dictate intermediate routing. When such reservation was made in the tariff: (1) where all-rail rates and rail-and-water rates are available the agent of the carrier must have had the shipper designate which of the two he wished to use; and (2) the agent could not route shipment via a route which will be more expensive to the shipper than the one desired by him, or which did not furnish substantially as good and expeditious service.

In the absence of specific routing which the carrier is willing to observe, the routing was via the cheapest reasonable route of the class designated by the shipper. The initial carrier had the duty to protect the routing.<sup>122</sup>

When a bill of lading was presented by a shipper showing both routing and rate, and the rate was not available by the prescribed routing, a routing applicable to the rate had to be adopted.<sup>123</sup>

When a carrier routed by a higher interstate rate and there was available a lower reasonable intrastate rate, damages for

120. Sec. 15 of Act; Sec. 402, *post*.

121. Conf. Ruling 286.

122. Conf. Rulings 214, 91, 93, 140, 190, 192, 198, 205, 214d, 286, 316.

123. Com. Ruling 286f.

the difference between the lower and higher rate may be allowed, unless the route over the interstate line was prescribed by the shipper.<sup>124</sup>

The routing instructions were not absolutely binding and the obligation of the carrier was to deal justly with the shipper.<sup>125</sup> While the Transportation Act 1920<sup>126</sup> gives the Commission power to make orders affecting the routing of freight, unless and until such orders are made carriers are obligated to observe instructions and rules relating to routing as heretofore.

§ 211. **Damages—General Statement.**—Carriers may voluntarily make rates lower than they could be compelled to make them, but the Commission will not award reparation on the basis of a rate lower than that which it would prescribe, even though the shipper and carrier may agree thereto.<sup>127</sup>

Where complainant operates an industrial road which is a plant facility, originating shipments and receiving an allowance from the carrier therefor or participating in the joint rate under which shipments moved, reparation has been denied by the Commission.<sup>128</sup> If, however, the industrial railroad was legally entitled to an allowance, and some may be, and,<sup>129</sup> if the allowance did not exceed a reasonable compensation, it would seem that where the rate, other than the portion allowed the industrial railroad, is unreasonable, that reparation should be awarded.

124. *Lathrop Lumber Co. v. Alabama G. S. R. Co.*, 27 I. C. C. 250; *Conf. Ruling 140*. See also: *McCaulld-Dinsmore Co. v. Chicago, G. W. Ry. Co.*, 14 I. C. C. 527; *Gus Momsen & Co. v. Gila Valley G. & N. Ry. Co.*, 14 I. C. C. 614; *Goodman Mfg. Co. v. Penn. R. Co.*, 26 I. C. C. 423; *Newman Lumber Co. v. Mississippi C. R. Co.*, 26 I. C. C. 97; *Sec. 15 of Act*; *Sec. 402, post*.

125. *Northern P. R. Co. v. Solum*, 247 U. S. 477, 62 L. Ed. 1221, 38 Sup. Ct. 550.

126. *Int. Com. Act*, *Sec. 1, Par. 15, 16*; *Secs. 344b to 344g, post*;

*Sec. 15, Par. 4, 5, 9 and 10*; *Secs. 396b, 396c, 401 and 402, post*.

127. *Pacific Elevator Co. v. Chicago, M. & St. P. R. Co.*, 17 I. C. C. 373, 374.

128. *Kaul Lumber Co. v. Central of Ga. Ry. Co.*, 20 I. C. C. 450; *Tap Line Case*, 23 I. C. C. 277, 549; *Commercial Club of Omaha v. Anderson & Saline River Ry. Co.*, 27 I. C. C. 302, 324. The *Kaul Case* is hardly sustained by the *Tap Line Cases*; *United States v. Louisiana & Pac. Ry. Co.*, 234 U. S. 1, 58 L. Ed. 1185, 34 Sup. Ct. 741.

129. *Sec. 171, ante*.

§ 212. **Damages for Misquoting a Rate.**—Prior to the Amendment of 1910 it was held that should a carrier's agent make a mistake and quote a wrong rate, the shipper receiving such quotation of a rate must nevertheless pay the correct rate even though he suffer severe loss thereby.<sup>130</sup> Nor does the fact that there was no rate on file change the rule.<sup>131</sup> Discussing this subject, the Commission, in its twenty-second Annual Report, pp. 16, 17, showed the hardship of the rule and said:

"The Commission feels that to require the shipper to ascertain for himself at his peril the rate imposes upon him an undue burden. The railway should know what its established charges are, and may be fairly required to state in writing, when a written request is made by the shipper, the rate which it has published and maintains in force. We call special attention to this matter as one of immediate and general concern, which discloses the need of an appropriate remedy, and urgently request that a suitable measure be promptly enacted."

In the first edition hereof, referring to the quotation above, it was said:

"It is undoubtedly true that shippers ordinarily do not know, and it would sometimes take an expert to find out, what a particular rate is, and therefore, reliance must be had on the information furnished by the agents of the carriers. The

130. *Poor v. Chicago, B. & Q. R. Co.*, 12 I. C. C. 418, 421, 422; *Tex. & Pac. Ry. Co. v. Mugg*, 202 U. S. 242, 50 L. Ed. 1011, 26 Sup. Ct. 628; *Gulf C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. Ed. 910, 15 Sup. Ct. 802; *Suffern Hunt & Co. v. Indiana, D. & W. Ry. Co.*, 7 I. C. C. 255, 278; *Houston & T. C. R. Co. v. Dumas*, 43 S. W. 609; *Chicago, R. I. & P. Ry. Co. v. Hubbell*, 54 Kans. 232, 38 Pac. 266, 5 I. C. R. 241; *Pond-Decker Lumber Co. v. Spencer*, 86 Fed. 846, 30 C. C. A. 430; *Mobile & O. R. Co. v. Dismukes*, 94

*Ala.* 131, 10 So. 289, 4 I. C. R. 200; *Atchison, T. & S. F. Ry. Co. v. Holmes*, 18 Okla. 92, 90 Pac. 22, *New York C. & H. R. R. Co. v. United States*, 212 U. S. 500, 53 L. Ed. 624, 29 Sup. Ct. 309; *Illinois Cent. R. Co. v. Henderson Elevator Co.*, 226 U. S. 441, 57 L. Ed. 290, 33 Sup. Ct. 176, reversing same styled case, 138 Ky. 220, 127 S. W. 779.

131. *Kansas City S. R. Co. v. Albers Com. Co.*, 223 U. S. 573, 56 L. Ed. 556, 32 Sup. Ct. 316, reversing same styled case, 79 Kan. 59, 99 Pac. 819.

Commission points out the evil but suggests no remedy. It would probably be an effective remedy to allow the Commission to award reparation in such cases as it might find were based upon an honest mistake of the carrier. The Commission would be able to prevent the evils which Mr. Commissioner Harlan points out in the Poor case, *supra*, and, if necessary to prevent discrimination, the rate mistakenly given might be open to all who ship contemporaneously with the shipper who relied on the misquoted rate."

By the Amendment of 1910,<sup>132</sup> it was made the duty of the carrier "after written request" to give a statement of the correct rate, and should there be a refusal to comply with a request properly made, or should there be given a wrong rate, and "if the person or company making such request suffers damage in consequence of such refusal or omission, or in consequence of the misstatement of the rate," the carrier is made liable by the statute to pay a penalty of two hundred and fifty dollars, which penalty shall accrue to the United States. As such refusal, omission or misstatement would come within the provisions of section eight of the Act, the shipper could recover and the Commission or a court could award "the full amount of damages sustained in consequence of any such violations."

This statement is not in conflict with the decisions of the Supreme Court in the Albers Commission case and the Henderson Elevator case, cited note *supra*. In the Albers Commission Co. case the court was careful to limit its opinion to the law in effect prior to 1910, and at page 598 of the opinion it was said: "To avoid any misapprehension in respect to the character of the liability sought to be enforced in this case, we deem it well to repeat that there was no claim of any right to reparation or damages under the Interstate Commerce Act, \* \* \* but only an attempt to enforce a supposed liability for a breach of the special agreement." A like limitation could be stated as to the Henderson Elevator case. The Commission in a case decided in 1913, refused reparation, but in that case there was no application

132. Act June 8, 1910; Sec. 368,  
*post.*

made and refused, and no misstatement under the amended law.<sup>133</sup>

§ 213. **Damages, to Whom Paid.**—Reparation is paid to him who pays the unlawful advance or exaction. For the wrong of being required to pay that which is unlawful under the Act, he who makes such payment has suffered legal damage to the extent of the amount paid in excess of the lawful rate or to the extent that he is damaged by an unlawful preference to another.

It is the person who sustains damages who is given the right to an award by way of reparation, and that the injured owner may add to the price of his commodity the amount of his damages does not relieve the carrier causing the damage and keeping the unlawful exaction of an excessive rate. For, as said by Mr. Commissioner Prouty:<sup>134</sup>

“If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them. Certainly these defendants are not entitled to this money which they have taken from the complainants, and they ought not to be heard to say that they should not be required to refund this amount because the complainants themselves may have obtained some portion of this sum from the consumer of the commodity transported.”

This statement of the Commission applies with more force to cases where the rate is unreasonable than to discrimination cases where there must be proof of damages by the shipper who suffers the loss.<sup>135</sup>

The manufacturer who sells his produce f. o. b. his plant pays no freight thereon, although the value of his product may be affected by the rate of carriage from his plant to the market. His damage, if any, however, is not subject of ascertainment. When he sells free on board cars at his place of

133. *Franke Grain Co. v. Illinois Cent. R. Co.*, 27 I. C. C. 625. As supporting the principle announced in the test. See *St. Louis S. W. Ry. Co. v. Lewellen*, 192 Fed. 540.

134. *Burgess v. Transcontinental Freight Bureau* 13 I. C. C. 668, 679, 680.

135. Sec. 208, *supra*.

business, the title passes upon delivery of the commodity to the carrier. The purchaser then owns the commodity and must pay the transportation charges thereon to whatever place he may direct shipment. Should there be loss or injury, the manufacturer would not suffer, but such loss or injury must be adjusted between the owner and the carrier. It may be that the higher rate affects the selling price at the point of manufacture, but to what extent cannot be definitely ascertained. Besides, the manufacturer does not fix his selling price according to the final destination of the commodity. He frequently does not know where the purchaser will send the goods when the purchase is made. The purchaser may decide to use the commodity at the point of manufacture, or ship to some place where the illegal rate does not apply. These and other considerations make it manifest that the legal injury is suffered by the person who pays for the carriage. This does not mean the man who actually hands the money or check to the carrier. It means the one who owns the commodity while in transit and who has undertaken to deliver it at a point requiring its shipment over the lines of the carrier who collects the unlawful charge. Frequently a manufacturer will sell his goods delivered at a particular point, but allow the consignee to advance the freight thereto, deducting the amount advanced from the purchase price of the goods. In such a case, the manufacturer has paid the freight and is entitled to recover the overcharge. The manufacturer may add the freight charges to the manufacturing cost, the jobber and the retailer may add not only such charges but a profit thereon when they sell, and in the end the consumer "pays the freight," but it would be impracticable to trace an overcharge to the consumer who never could make proof entitling him to a recovery. The law will not attempt to follow these speculations, but will let the carrier repay to the man, who pays for the transportation of his property, all charges above what such shipper is legally bound to pay<sup>136</sup>

136. Commercial Club of Omaha Co., 14 I. C. C. 199, 208; *Sunny-side Coal Mining Co. v. Denver & S. R. R. Co.*, 27 I. C. C. 302, 323; *Nicola, Stone & Meyers Co. v. Louisville & N. R. Co.*, 19 I. C. C. 20; *Mountain Ice Co. v. Delaware, L.*

Cases of unlawful discrimination may present a different issue and one where a manufacturer could show loss of business because a competitor had a less rate.

The Commission declined to award reparation before a complainant had paid the lawful rate.<sup>127</sup>

The right to recover damages under the Act may be assigned,<sup>128</sup> but by conference ruling 362 the Commission said: "In awarding reparation the Commission will recognize an assignment by a consignor to a consignee or by a consignee to a consignor, but will not recognize an assignment to a stranger to the transportation records."

§ 214. **Damages, by Whom Paid.**—Where the illegal rate is a joint rate over a through route consisting of several carriers, the question arises as to what carrier or carriers must pay the reparation, and as to whether the liability is joint or several; that is, is each carrier jointly and severally liable for all the illegal rate, or is each carrier liable for only the proportion of the illegal charge received by it? The charging of an illegal rate is a tort and all participants in such illegal act are joint tort feorsors, and as such each carrier is jointly and severally liable. Where, as was found to be a fact in the Tift case, supra, an illegal advance was made by a combination of carriers by concerted and concurrent action in violation of the Sherman Anti-Trust law, it would seem that each and all carriers who participated in the action by which the advance was made would be joint tort feorsors and liable to any one who suffered damages by such illegal advance. The Commission does not fully agree with this proposition, and in the Nicola, Stone and Myers case, announced the rule as follows:

& W. R. Co., 21 I. C. C. 596; Baker Mfg. Co. v. Chicago & N. W. R. Co., 21 I. C. C. 605; Carolina Portland Cement Co. v. Chesapeake & O. Ry. Co., 21 I. C. C. 533; Lamb, McGregor & Co. v. Chicago & N. W. Ry. Co., 22 I. C. C. 346; Deming Lumber Co. v. Southern Pac. Co., 24 I. C. C. 598; Sondheimer v. Illinois

Cent. R. Co., 20 I. C. C. 606. Southern R. Co. v. Darnell Taenzer Lumber Co., 245 U. S. 531, 62 L. Ed. 451, 38 Sup. Ct. 196.

137. Rosenblatt v. Chicago & N. W. Ry. Co., 18 I. C. C. 261.

138. Edmunds v. Illinois Cent R. Co., 80 Fed. 78; Jubitz, Assignee, v Southern Pac. Co., 27 I. C. C. 44. The Commission declined to

"The complainants contend that the defendant carriers who concurred in establishing the unlawful advance in the rates under consideration are jointly and severally liable for all the damages resulting therefrom, whether or not participating in the particular rate from which the individual overcharge resulted. We cannot concur in so broad a view of the liability of the defendants. We do not think those carriers who received no part of the charges and who did not participate in the movement of the commodity should be liable to refund the whole or any part of the rate for the movement of a shipment in which they did not participate. We think that the liability is restricted to those carriers who participated in the transportation of the lumber via their respective routes over which the several shipments moved, and who shared in the transportation charges therefor, and that such carriers are jointly and severally liable to the persons found to be entitled to the refund."<sup>139</sup>

The rule announced in concluding the foregoing quotation has been followed by the Commission whose orders are issued against the carriers jointly.<sup>140</sup>

§ 215. **Damage—Protest Unnecessary.**—It is not necessary that a rate be paid under protest in order to enable a shipper paying it to recover the excessive and unlawful portion thereof. This is true because the law requires no useless thing,

express an opinion on this point, *O'Brien Com. Co. v. Chicago & N. W. Ry. Co.*, 20 I. C. C. 68. The Commission has adhered to its conference ruling but the assignability of the right to recover has been recognized by the Courts. *A. T. & S. F. Ry. Co. v. Spiller*, 246 Fed. 1, 19, 158 C. C. A. 227.

139. *Osborne v. Chicago & N. W. Ry. Co.*, 48 Fed. 49; *Interstate Com. Com. v. Louisville & N. R. Co.*, 118 Fed. 613; *Nicola, Stone & Meyers Co. v. Louisville & N. R. Co.*, 14 I. C. C. 199; *Blackhorse Tobacco Co. v. Illinois Cent. R. Co.*, 17 I. C. C. 588. Nor is it

necessary that all the parties liable should be defendants, *Independent Refiners Assn. v. Western N. Y. & P. R. Co.*, 6 I. C. C. 378; *Webster Grocery Co. v. Chicago & N. W. Ry. Co.*, 21 I. C. C. 20.

140. *Green & Son v. Sou. Ry. Co.*, 40 I. C. C. 157, 159; *Riverside Mills v. A. & S. S. S. Co.*, 40 I. C. C. 501, 502; *Squire & Co. v. A. S. R. Co.*, 44 I. C. C. 509, 511. The Circuit Court of Appeals acted on a contrary principle but probably without careful consideration as the amount was trifling and the question arose only in

and in no case where a rate is fixed in the schedules filed according to law, would protest avail anything. The carrier could not, if it wished, yield to the protest and charge less than the tariff rates. This question has been before the Commission and has been decided in harmony with the principles stated.<sup>141</sup>

The holding of the Commission is not in conflict with the decision of the courts. It may be admitted that ordinarily where a payment is voluntarily made it cannot be recovered, but where a payment must be made by force of law and where the law prescribes a particular method by which it may be determined whether or not the payment is legal, protest is neither necessary nor effective. The case of *Knudsen-Ferguson Fruit Co. v. Chicago, St. P., M. & O. Ry. Co.*<sup>142</sup> illustrates the distinction between charges collected under the force of a tariff and charges paid voluntarily. In that case, an icing charge of \$45.00 was made under a tariff treating icing as a separate charge from transportation, the

cidentally *Mo. Pac. R. Co. v. Ferguson Saw Mill Co.*, 235 Fed. 474, 481, 149 C. C. A. 20.

141. *Southern Pine Lumber Co. v. Southern Ry. Co.*, 14 I. C. C. 195; *Baer Bros. v. Mo. Pac. Ry. Co.*, 13 I. C. C. 329; *National Refining Co. v. Atchison, T. & S. F. Ry. Co.*, 18 I. C. C. 389; *Pennsylvania R. Co. v. International Coal Co.*, 173 Fed. 1, 97 C. C. A. 383. While this case was reversed by the Supreme Court, same styled case, 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893, that court did not discuss this question and remanded the case, which would have been useless if protest had been necessary; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 181 Fed. 403. The subsequent history of this case, though not affecting this question, is: Dismissed, same styled case, 183 Fed. 908, appeal

dismissed, same styled case, 192 Fed. 475, 112 C. C. A. 637, Writ of certiorari denied 223 U. S. 733, 56 L. Ed. 635, 32 Sup. Ct. 528. On appeal affirmed in part and reversed in part, 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916. The statement in *Denver & R. G. R. Co. v. Baer Bros. Mercantile Co.*, 209 Fed. 577, 580, 126 C. C. A. 399, was directed to the subject of interest and cannot be claimed as a precedent against the principles stated in the text. See *Baer Bros. Mercantile Co. v. D. & R. G. R. Co.*, 233 U. S. 479, 58 L. Ed. 1055, 34 Sup. Ct. 641. *Sou. Pacific Co. v. California Adjustment Co.*, 237 Fed. 954, 955. 150 C. C. A. 604.

142. *Knudson-Ferguson Fruit Co. v. Chicago, St. P. M. & O. Ry. Co.*, 149 Fed. 973, 79 C. C. A. 483, 204 U. S. 670, 51 L. Ed. 672. Petition for writ of certiorari denied.

schedules stating "that the published charge for transportation did not include the cost of icing in transit, but that the carrier would impose an additional charge for such service." Such a tariff would not comply with the present law as to filing tariffs, but it is clear that no icing charges were specified in the tariff and a payment of such charges was not made under the force of law. Therefore, when ten days after having received his goods, the shipper voluntarily paid the icing charges the court correctly held, in a suit brought a year thereafter, that he could not recover. While it is true that protest is not necessary, a shipper, when an illegal advance is made, should not continue paying it, without objection or protest until a large claim has accumulated against the carrier.

**§ 216. Damages—Interest and Attorneys Fees.**—It is the practice of the Commission to allow interest at six per cent on awards of damages. The statute makes no provision for interest, but the loss of money is an injury and to give "the full amount of damages" must include interest. That the Commission has this power, has been asserted when a protest was made,<sup>143</sup> though it would seem from the authorities discussed in the next preceding section that a protest is immaterial.<sup>144</sup>

Attorneys fees are provided for by the statute and may be fixed by the court when the award of the Commission is sued on and recovery is had. The statute is a valid law.<sup>145</sup>

The Commission has no authority and does not assume to award attorney's fees,<sup>146</sup> nor can attorney's fees be allowed by the courts for the services of an attorney before the Com-

143. *Denver & R. G. R. Co. v. Baer Bros. Merc. Co.*, 209 Fed. 577, 580, 126 C. C. A. 399; *Chicago M. & St. P. Ry. Co. v. Harmel*, 240 Fed. 381, 153 C. C. A. 307.

144. *Mo. Pac. Ry. Co. v. Ferguson Saw Mill Co.*, 235 Fed. 474, and cases cited 482, 149 C. C. A. 20.

145. *Chicago, B. & Q. R. Co. v. Feintuch*, 191 Fed. 482, 488, 489, 112 C. C. A. 126; *Denver & R. G.*

*R. Co. v. Baer Bros. Merc. Co.*, 209 Fed. 577, 581 and cases there cited, 126 C. C. A. 399. No attorney's fees in suits in state court for excess rate, *Kansas City Sou. Ry. Co. v. Tonn*, 102 Ark. 20, 143 S. W. 577.

146. *Council v. Western & A. R. Co.*, 1 I. C. C. 399, 1 I. C. R. 638; *Washer Grain Co. v. Missouri Pac. Ry. Co.*, 15 I. C. C. 147,

mission. The attorney's fees are allowed only for services in the courts.<sup>147</sup>

§ 217. **Award of Damages an Inadequate Remedy.**—Prior to the Amendment of 1910, when a carrier increased a rate the only remedy the Commission could enforce was to investigate upon complaint filed and, after hearing, award damages for the illegal exaction, if the rate increased was held unlawful. The Commission recognized this and stated the fact as follows:

"While it is certainly true that the remedy by way of damages is utterly inadequate and inconsistent, it is apparently the remedy prescribed by the act to regulate commerce and the only remedy which the shipper has against the exaction of an unreasonable interstate rate."<sup>148</sup>

Some of the federal courts held that an injunction could issue preventing an advance or at least staying the advance until the Commission could determine whether or not the increased rate was illegal,<sup>149</sup> but there was uncertainty about the remedy. To meet this evil, the Amendment of 1910 was enacted, giving the Commission power to suspend an advance.<sup>150</sup>

§ 218. **Damages, Limitation on Complaint for.**—Section sixteen of the Act to Regulate Commerce as amended by the Hepburn law fixed a limitation on the right of action for damages in the following language: "All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after."<sup>151</sup> Prior to this amendment there was no limitation in the statute and the limitation laws of the state in which a suit

152, 154, 155; *Peller v. P. R. Co.*, 40 I. C. C. 84, 86; *Minn. & Ontario P. Co. v. B. F. & I. F. Ry. Co.*, 47 I. C. C. 208.

147. *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 59 L. Ed. 644, 35 Sup. Ct. 328; *Mills v. Le-*

*high V. R. Co.*, 238 U. S. 473, 59 L. Ed. 1414, 35 Sup. Ct. 888.

148. *McGrew v. Mo. Pac. Ry. Co.*, 8 I. C. C. 630.

149. Secs. 304 and 305, *post*.

150. Sec. 398, *post*.

151. Sec. 408, *post*.

was filed controlled.<sup>152</sup> No limitation ran prior to the effective date of the Hepburn Amendment which date was held to be August 28, 1906, although the Act was approved June 29, 1906.<sup>153</sup>

A complaint filed by an association demanding reparation under general averments, which does not name the members on whose behalf it is filed and which does not with reasonable particularity specify and describe the shipments as to which the complaint is made, will not operate to stop the running of the period of limitation fixed by law.<sup>154</sup>

When, however, an individual files a complaint for reparation in his own behalf, an informal complaint will stop the running of the statute.<sup>155</sup>

The cause of action accrues when the shipment terminates and the complainant becomes liable for the freight and not when the money is actually paid.<sup>156</sup>

152. *Ratican v. Terminal R. Asso.*, 114 Fed. 666. *Contra* holding *R. S. U. S. § 1047* applied. *Carter v. New Orleans & N. E. R. Co.*, 143 Fed. 99, 74 C. C. A. 293; *Cattle Raisers' Asso. v. Chicago, B. & Q. R. Co.*, 10 I. C. C. 83.

153. *Nicola, Stone & Myers Co. v. Louisville & N. R. Co.*, 14 I. C. C. 199, 206. See also *Kile, Morgan & Co. v. Deepwater Ry. Co.*, 15 I. C. C. 235; *Nollenberger v. Mo. Pac. Ry. Co.*, 15 I. C. C. 595; *Re When a Cause of Action Accrues*, 15 I. C. C. 201, 204.

154. *Missouri & Kan. Shippers Asso. v. Atchison, T. & S. F. Ry. Co.*, 13 I. C. C. 411.

155. *Venus v. St. Louis, I. M. & S. Ry. Co.*, 15 I. C. C. 136, 137; *Woodward & D. v. Louisville & N. R. Co.*, 15 I. C. C. 170; *Beekman Lumber Co. v. St. Louis, I. M. & S. Ry. Co.*, 15 I. C. C. 274, 276; *Hartman Furn. & Car-*

*pet Co. v. Wisconsin Cent. Ry. Co.*, 15 I. C. C. 530, 531; *Duluth Log Co. v. Minnesota & Int. Ry. Co.*, 15 I. C. C. 627; *Nicola, Stone & Myers Co. v. Louisville & N. R. Co.*, 14 I. C. C. 199, 206; *Louisville & N. R. Co. v. Dickerson*, 191 Fed. 705, 112 C. C. A. 295; but the informal complaint must refer to the particular rate involved, *Acme Cement Plaster Co. v. St. Louis & S. F. R. Co.*, 18 I. C. C. 376.

156. *Arkansas Fertilizer Co. v. United States*, 193 Fed. 667, Com. Court Opinion No. 43, p. 283; *Blinn Lumber Co. v. Southern Pac. Co.*, 18 I. C. C. 430; The text is true only because the Transportation Act 1920 so provides. Sec. 408, *post*; *Louisville Cement Co. v. L. & N. R. Co.*, 50 I. C. C. 538, and case cited; *Lamb-Fish Lumber Co. v. Transcontinental Freight Bureau*, 53 I. C. C. 221, 222 and cases cited.

The Commission has no jurisdiction unless the claim is filed in time and cannot relieve from the operation of the statute.<sup>157</sup>

§ 219. **General Investigations by the Commission.**—The Interstate Commerce Commission is authorized and empowered to enforce the provisions of the Act to Regulate Commerce. To accomplish which it has authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created, and it may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made. It also has "power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation. Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section."<sup>158</sup>

In the *Brimson* case,<sup>159</sup> an informal complaint having been made of the facilities of certain carriers, the Commission of its own motion decided to investigate the matters set forth in such complaint; and thereupon it made an order reciting the facts of the informal complaint and requiring

157. *Werner Saw Mill Co. v. Illinois Cent. R. Co.*, 17 I. C. C. 388; *Morrisdale Coal Co. v. Penn. R. Co.*, 230 U. S. 304, 57 L. Ed. 1474, 33 Sup. Ct. 938; To stop the running of the statute there must be a definite claim for reparation in the complaint filed. *Mo. Pac.*

*Ry. Co. v. Ferguson Saw Mill Co.*, 235 Fed. 474, 484, 149 C. C. A. 20.

158. Sec. 12 of Act; Sec. 390, *post.*

159. *Int. Com. Com. v. Brimson*, 154 U. S. 447, 38 L. Ed. 1074, 14 Sup. Ct. 1125.

each of certain named carriers "to make and file, in its office at Washington, a full, complete, perfect and specific verified answer setting forth all facts in regard to the matters complained of and responding to" certain questions relating to the methods of operation of the carriers and especially as to the relation of such carriers to the Illinois Steel Company. To these questions each carrier filed a denial and each averred that it had, in all respects, complied with the obligations imposed by the laws of the United States. Notwithstanding these denials, the Commission continued the investigation by the examination of witnesses and books and documents. It subpoenaed W. G. Brimson, who was president and manager of five carriers incorporated under the laws of Illinois, which carriers were among those under investigation. This witness refused to answer the question as to the ownership of his companies by the Illinois Steel Company. Other witnesses refused to answer the same question. The Commission thereupon filed its petition in the circuit court praying that the witnesses be required to answer the questions. The circuit court refused the order, holding that the proceeding did not constitute a controversy to which the judicial power of the United States could be extended. Section twelve of the Act was held valid in the Supreme Court, the circuit court reversed and the cause remanded with directions to proceed in conformity with the opinion of the Supreme Court. The very able opinion of Mr. Justice Harlan concluded as follows:

"We are of the opinion that a judgment of the circuit court of the United States determining the issues presented by the petition of the Interstate Commerce Commission and by the answers of appellees, will be a legitimate exertion of judicial authority in a case or controversy to which, by the Constitution, the judicial power of the United States extends. And a final order by that court dismissing the petition of the Commission, or requiring the appellees to answer the questions propounded to them, and to produce the books, papers, etc., called for, will be a determination of questions upon which a court of the United States is capable of acting and which may be enforced by judicial process."

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158. Sec. 12 of Act; Sec. 390, *post*.

159. *Int. Com. Com. v. Brimson*, 154 U. S. 447, 38 L. Ed. 1074, 14 Sup. Ct. 1125.

each of certain named carriers "to make and file, in its office at Washington, a full, complete, perfect and specific verified answer setting forth all facts in regard to the matters complained of and responding to" certain questions relating to the methods of operation of the carriers and especially as to the relation of such carriers to the Illinois Steel Company. To these questions each carrier filed a denial and each averred that it had, in all respects, complied with the obligations imposed by the laws of the United States. Notwithstanding these denials, the Commission continued the investigation by the examination of witnesses and books and documents. It subpoenaed W. G. Brimson, who was president and manager of five carriers incorporated under the laws of Illinois, which carriers were among those under investigation. This witness refused to answer the question as to the ownership of his companies by the Illinois Steel Company. Other witnesses refused to answer the same question. The Commission thereupon filed its petition in the circuit court praying that the witnesses be required to answer the questions. The circuit court refused the order, holding that the proceeding did not constitute a controversy to which the judicial power of the United States could be extended. Section twelve of the Act was held valid in the Supreme Court, the circuit court reversed and the cause remanded with directions to proceed in conformity with the opinion of the Supreme Court. The very able opinion of Mr. Justice Harlan concluded as follows:

"We are of the opinion that a judgment of the circuit court of the United States determining the issues presented by the petition of the Interstate Commerce Commission and by the answers of appellees, will be a legitimate exertion of judicial authority in a case or controversy to which, by the Constitution, the judicial power of the United States extends. And a final order by that court dismissing the petition of the Commission, or requiring the appellees to answer the questions propounded to them, and to produce the books, papers, etc., called for, will be a determination of questions upon which a court of the United States is capable of acting and which may be enforced by judicial process."

In the Baird case,<sup>160</sup> which was also an application of the Commission to the court to compel the testimony of witnesses, the defendant urged that though a complaint was filed, the complainant "did not show any real interest in the case brought." The witnesses were required to answer.

In the Harriman case<sup>161</sup> the investigation was upon the motion of the Commission, not upon complaint. The relations between the Union Pacific Railroad Company and other connecting roads, whether parallel or not, were inquired about and certain questions asked were, under advice of counsel, not answered by the witnesses.

The gist of the opinion is contained in a short paragraph, which is here reproduced:

"We are of the opinion on the contrary that the purposes of the act for which the Commission may exact evidence embrace only complaints for violation of the act, and investigations by the Commission upon matters that might have been made the object of complaint. As we have already implied the main purpose of the act was to regulate the interstate business of carriers, and the secondary purpose, that for which the Commission was established, was to enforce the regulations enacted. These in our opinion are the purposes referred to; in other words the power to require testimony is limited, as it usually is in English-speaking countries at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law."

In its twenty-second Annual Report (1908) the Commission pointed out the difficulties of administering the law with the limitations stated in the Harriman case.

§ 220. **Same Subject—Amendment of 1910.**—Section 13 of the Act in force at the date of the decision in the Harriman case *supra*, after providing for hearings on complaint, in addition to the power conferred by section 12 *supra*, gave power to the Commission to "institute any inquiry on its own motion in the same manner and to the same effect as

160. *Int. Com. Com. v. Baird*,  
194 U. S. 25, 48 L. Ed. 860, 867,  
24 Sup. Ct. 563.

161. *Harriman v. Int. Com.*  
*Com.*, 211 U. S. 407, 419, 420, 53  
L. Ed. 253, 29 Sup. Ct. 115.

though complaint had been made." The same section as amended by the Act of 1910<sup>162</sup> materially enlarges the powers of the Commission in this respect, giving it full authority and power "on its own motion in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complainant on petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money."

The Transportation Act 1920 increased the subjects that may be investigated, but did not change the principles which should control such investigations.<sup>163</sup>

In the Harriman case this *quære* was propounded: "Whether Congress has unlimited power to compel testimony in regard to subjects which do not concern direct breaches of the law, and whether, and to what extent, it can delegate such power." It need not be said that Congress has *unlimited* power in this respect but it would seem that the power granted to the Commission as stated herein was a proper and constitutional delegation because necessary to the performance of the duties of the Commission under the Act to Regulate Commerce. The Goodrich Transit Co. case, while not directly in point, supports this statement.<sup>164</sup>

The provisions of the Act giving the Commission power to prescribe methods of accounting and to require reports from the carriers subject to its jurisdiction, are complementary to

162. Sec. 393, *post*.

163. Transportation Act 1920; Sec. 416; Int. Com. Act, Sec. 13; Secs. 393, 393 A, 393 B, *post*.

164. Int. Com. Com. v. Goodrich Transit Co., 224 U. S. 194, 56 L. Ed. 729, 32 Sup. Ct. 436,

reversing Commerce Ct. in Goodrich Transit Co. v. Interstate Com. Com., 190 Fed. 943, Commerce Court Opinions Nos. 21-24, p. 95; See in this connection: Smith v. Int. Com. Com., 245 U. S. 33, 62 L. Ed. 135, 38 Sup. Ct. 34.

the power to make general investigations, and these powers relating to "the accounts which such carriers must keep are valid."<sup>165</sup> In making investigations into the "accounts, records and memoranda" kept by the carriers, the Commission has no power to investigate general correspondence and original documents not required to be entered on their books.<sup>166</sup> The rather extraordinary avowal by counsel asking the questions that they were asked as the beginning of "an attempt to go into the whole business of the Armour car lines—a fishing expedition into the affairs of a stranger for the chance that something discreditable might turn up," resulted in the Ellis case<sup>167</sup> in a refusal by the witness to answer the questions. After making the statement in the quotation above, the Supreme Court held that the Commission had no power to demand answers to such questions.

**§ 221. Commission May Ask the Aid of Courts to Enforce the Law.**—We have seen that the Commission may apply to courts to aid it in obtaining testimony in investigations relating to violations of the Act to Regulate Commerce. Upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of the Act to Regulate Commerce and for the punishment of all violations thereof.

At the request of the Commission suit was filed and an injunction granted enjoining a carrier from engaging in interstate commerce without filing tariffs and making reports as required by law and also enjoining discriminatory practices.<sup>168</sup>

165. *Kansas City S. Ry. Co. v. U. S.*, 231 U. S. 423, 58 L. Ed. 926, 34 Sup. Ct. 125.

166. *United States v. L. & N. R. Co.*, 212 Fed. 486; affirmed U. S. v. L. & N. R. Co., 236 U. S. 318, 59 L. Ed. 598, 35 Sup. Ct. 363; *United States v. N. C. & St. L. Ry. Co.*, 217 Fed. 254.

167. *Ellis v. Interstate Com. Com.*, 237 U. S. 434, 59 L. Ed. 1636, 35 Sup. Ct. 645.

168. *United States v. Union Stock Yard & Transit Co.*, 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83, same styled case in Commerce Court, 192 Fed. 330, Opinion Com. Ct. No. 15, p. 189.

§ 222. **Commission Has Power to Prescribe Rates for the Future.**—When the Act to Regulate Commerce was originally passed the Commission appointed thereunder, believing the law so authorized, exercised the power to prescribe rates for the future. That this power was not delegated to the Commission prior to the Hepburn amendment was definitely decided by the Supreme Court in *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*,<sup>169</sup> where the question was elaborately discussed and the conclusion stated "that under the interstate commerce act the Commission has no power to describe the tariff of rates which shall control in the future." Under the old law the Commission had and exercised the power to declare a particular advance in rates illegal. The exercise of this power practically meant prescribing the old rate as the rate for the future. This is clearly shown in the Tift case. There an advance was made by the carriers, this advance, on hearing, was declared illegal, and the whole advance was held to be the measure of reparation allowed shippers.<sup>170</sup>

The Amendments of 1906, 1910 and of 1920 give the Commission power to initiate rates, fares and charges and to prescribe minimum and maximum or minimum or maximum rates, fares and charges.<sup>171</sup>

When a rate, regulation or practice of a common carrier is within the jurisdiction conferred on the Commission it may prescribe what shall be such rate, regulation or practice for the future, and when the Commission acts on substantial evidence in accordance with law, its orders in respect to the questions within its jurisdiction will not be set aside by the courts.<sup>172</sup> "But," said Mr. Justice Lamar, delivering the

169. *Interstate Com. Com. v. Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896.

170. *Southern Ry. Co. v. Tift*, 206 U. S. 428, 51 L. Ed. 1124, 27 Sup. Ct. 109; *Southern Pine Lumber Co. v. Sou. Ry. Co.*, 14 I. C. C. 195; *Nicola Stone & Myers Co. v. Louisville & N. R. Co.*, 14 I. C. C. 199.

171. Sec. 16, *Interstate Com. Act*, Sec. 15, par. 1, Sec. 395, *post*.

172. *Interstate Com. Com. v. Illinois Cent. R. Co.*, 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. 155; *Interstate Com. Com. v. Chicago & A. R. Co.*, 215 U. S. 479, 54 L. Ed. 291, 30 Sup. Ct. 163; *Interstate Com. Com. v. Chicago, R. I. & P. Ry. Co.*, 218 U. S. 88, 54 L. Ed. 946, 30 Sup. Ct. 651;

opinion of the Supreme Court, "the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law, and must, in the language of the statute, be 'set aside by a court of competent jurisdiction.' " 173

The "opinion" of the Commission upon which it may act must be based upon a full hearing at which evidence is received, of which the carrier is apprised and given an opportunity to meet.<sup>174</sup>

The Commission has entered many orders under the authority granted by this provision. Illustrative of these are: distribution of cars,<sup>175</sup> prescribing rates,<sup>176</sup> division of rates,<sup>177</sup> terminal charges,<sup>178</sup> ordinary switch connections,<sup>179</sup> prohibit-

Interstate Com. Com. v. Delaware, L. & W. R. Co., 220 U. S. 235, 55 L. Ed. 448, 31 Sup. Ct. 392.

173. Interstate Com. Com. v. Louisville & N. R. Co., 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185, reversing Louisville & N. R. Co. v. Interstate Com. Com., 195 Fed. 541, Opinion Com. Ct. No. 4, p. 325, 375.

174. Atlantic C. L. R. Co. v. Interstate Com. Com., 194 Fed. 449, Opinion Com. Ct. No. 3, p. 255.

175. Traer v. Chicago & A. R. Co., 13 I. C. C. 451; Chicago & A. R. Co., and Illinois Cent. R. Co. v. Interstate Com. Com., 173 Fed. 930; Interstate Com. Com. v. Illinois Cent. R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. 155; Interstate Com. Com. v. Chicago & A. R. Co., 215 U. S. 479, 54 L. Ed. 280, 30 Sup. Ct. 163; Hillsdale Coal & Coke Co. v. Pennsylvania R. Co., 19 I. C. C. 356, sustained, Pennsylvania R. Co. v. Interstate Com. Com., 193 Fed. 81, Opinion Com. Ct. No. 31, p. 275.

176. Burnham-Hanna-Munger Dry Goods Co. v. Chicago, R. I. &

P. Ry. Co., 14 I. C. C. 299, order enjoined, Chicago, R. I. & P. Ry. Co. v. Interstate Com. Com., 171 Fed. 680, Commission sustained, Interstate Com. Com. v. Chicago, R. I. & P. Ry. Co., 213 U. S. 88, 96, 54 L. Ed. 946, 30 Sup. Ct. 651, holding that the power extends to the regulation of old or new rates, notwithstanding changes in business may be necessary.

177. Eichenberg v. Southern Pac. Co., 14 I. C. C. 250, Injunction denied, Southern Pac. Terminal Co. v. Interstate Com. Com., 166 Fed. 134, Commission sustained, Southern Pac. Terminal Co. v. Interstate Com. Com. 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279.

178. Cincinnati & C. Traction Co. v. Baltimore & O. S. W. R. Co., 20 I. C. C. 486, enjoined, Baltimore & O. S. W. R. Co. v. United States, 195 Fed. 962, Opinion Com. Ct. No. 60, p. 431, order voided, United States v. Baltimore & O. S. W. R. Co., 226 U. S. 14, 57 L. Ed. 104, 33 Sup. Ct. 5.

179. Corp. Com. of North Caro-

ing discrimination,<sup>180</sup> icing charges and freecooling.<sup>181</sup>

The Commission, however, has no jurisdiction to fix rates based upon estoppel of the carrier.<sup>182</sup> When relief is denied to the shipper, the order cannot be set aside by a court.<sup>183</sup>

§ 223. **Suspension of Rates, Regulations and Practices.**—

The Act of 1910 gives the Commission authority, with or without complaint or other formal pleadings, but upon reasonable notice, temporarily to suspend and, after hearing, to make such orders in reference to fares, charges, classifications, regulations, and practices, as would be proper in a proceeding after such fares, etc., became effective. The burden of proof to justify the increased rate is on the carrier at all hearings

*lina v. Norfolk & W. Ry. Co.*, 19 I. C. C. 303, order sustained, *Norfolk & W. Ry. Co. v. United States*, 195 Fed. 953, Opinion Com. Ct. No. 40, p. 413; *New Orleans Board of Trade v. Louisville & N. R. Co.*, 17 I. C. C. 231, order set aside, *Louisville & N. R. Co. v. Interstate Com. Com.*, 195 Fed. 541, Opinion Com. Ct. No. 4, pp. 325, 375, Commerce Ct. reversed, *Interstate Com. Com. v. Louisville & N. R. Co.*, 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185; *Chamber of Commerce of Newport News v. Southern Ry. Co.*, 23 I. C. C. 345, sustained, *Southern Ry. Co. v. United States*, 204 Fed. 465, Opinion Com. Ct. No. 82, p. 603; *Railroad Com. of La. v. St. Louis & S. W. Ry. Co.*, 23 I. C. C. 31, sustained, *Texas & Pac. Ry. Co. v. United States*, 205 Fed. 380, Opinion Com. Ct. No. 68, p. 655, (Shreveport Case); *Houston, E. & W. T. Ry. Co. v. United States*, 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833.

180. *Atchison, T. & S. F. Ry. Co. v. United States*, 203 Fed. 56, 59, Opinion Com. Ct. No. 61, p. 537. For history of case, see *Arling-*

*ton Heights Fruit Co. v. Southern Pac. Co.*, 22 I. C. C. 149, *Atchison, T. & S. F. Ry. Co. v. Interstate Commerce Com.*, 190 Fed. 591, Opinion Com. Ct. No. 7, p. 83.

181. *Arlington Heights Fruit Co. v. Southern Pac. Co.*, 20 I. C. Co. 106; *Re Precooling and Pre-icing*, 23 I. C. C. 267, order sustained, *Atchison, T. & S. F. Ry. Co. v. United States*, 204 Fed. 647, Opinion Com. Ct. No. 41, p. 627, affirmed, *Atchison, T. & S. F. Ry. Co. v. United States*, 232 U. S. 199, 58 L. Ed. 568, 34 Sup. Ct. 291.

182. *Southern Pac. Co. v. Interstate Com. Com.*, 219 U. S. 433, 55 L. Ed. 283, 31 Sup. Ct. 288, reversing *Southern Pac. Co. v. Interstate Com. Com.*, 177 Fed. 963, and the Commission in *Western Oregon Lumber Mfg. Assn. v. Southern Pac. Co.*, 14 I. C. C. 61.

183. *Proctor & Gamble v. United States*, 225 U. S. 282, 56 L. Ed. 1091, 32 Sup. Ct. 761; *Louisville & N. R. Co. v. United States*, 207 Fed. 591, Opinion Com. Ct. No. 86, p. 699. See Sec. 308 A., *post*.

involving a rate increased after January 1, 1910, or of a rate sought to be increased after the passage of the Amendment of June 18, 1910.<sup>184</sup>

This hearing under the Transportation Act 1920 must be concluded in 150 days, else the new individual or joint rate, fare, charge, classification or practice becomes effective; subject, however, to the carrier being required to render an accounting should the Commission thereafter condemn the charge.<sup>185</sup>

The Commission has held many investigations under this section, the most conspicuous of which are the Advances in Rates—Eastern case,<sup>186</sup> Advances in Rates—Western case,<sup>187</sup> Five Per Cent Advance,<sup>188</sup> and in the Western Advance Rate case 1915.<sup>189</sup> In the Eastern Advance case the question of the burden of proof was discussed, and it was there held that the Amendment of 1910 was unlike the English Act on a similar subject. Said the Commission:

“Nor should our statute receive exactly the same interpretation which has been put upon the English act. That act provides that the carrier shall justify the ‘increase of the rate.’ Our act provides that the burden of proof shall be upon the carrier to show that the ‘increased rate’ is just and reasonable. The English act creates a presumption that the rates in effect on December 31, 1892, were reasonable rates, and the justice of any increase must be tried by that standard. Our act does not intend to enact that all rates in effect on January 1, 1910, are just and reasonable. Upon the contrary, it is open to any shipper or to this Commission to attack such a rate as unjust and unreasonable. The only effect of our statute is to cast, in certain cases, the burden of proof upon the carrier.”

It was also then held that rates otherwise reasonable would not be permitted to be advanced “for the purpose of bol-

184. Re Rates on Crushed Stone, 29 I. C. C. 136.

185. Transportation Act 1920, amending Sec. 15, par. 7 *post*, secs. 398, 399.

186. Advances in Rates, Eastern Case, 20 I. C. C. 243.

187. Advance in Rates, Western Case, 20 I. C. C. 307.

188. Five Per Cent Case, 31 I. C. C. 351, 32 I. C. C. 325.

189. Western Rate Advance Case 1915, 35 I. C. C. 497.

stering up the credit of our railroads," and that "no general advance in rates should \* \* \* be permitted until carriers have exhausted every reasonable effort toward economy in their business."<sup>190</sup>

§ 224. **Through Routes and Joint Rates.**—The Commission has, after hearing, on a complaint or upon its own initiative, the right to establish joint rates and prescribe the divisions thereof, and the terms and conditions under which through routes shall be operated. Under what circumstances a through route and joint rate shall be prescribed has been discussed herein, section 195 *supra*, and need not be repeated. It is sufficient to say that when the carriers over whose lines the through route is to be established are subject to the jurisdiction of the Commission, the Commission has a discretion as to whether or not it will establish the through route and joint rate.<sup>191</sup>

As shown in section 195 this discretion must be exercised within the terms of the statute.

§ 225. **Allowances for Services or Instrumentalities.**—The Amendment of 1906 provides:

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order." This authority of the Commission was discussed in the chapter on Equality of Rates.

§ 226. **Powers Enumerated, Not Exclude Others.**—By the Amendment of 1906, concluding section 15 of the Act, it was provided, "the foregoing enumeration of powers shall not exclude any power which the Commission would other-

190. Pp. 253, 254, 255, 279 of  
Opinion Eastern Case, *supra*.

191. Truckers Transfer Co. v.  
Charleston & W. C. Ry. Co., 27 I.  
C. C. 275, 277.

wise have in the making of an order under the provisions of this Act." Obviously this provision is not a grant of power; it merely evidences a legislative intention not to limit any general grant by specific provisions relating to particular powers, an intention that the Act should be construed as remedial. The general purposes of the Act were to prevent unjust rates, to require fair play between shippers, and to make rates certain in order that such fair play might exist, and Congress has emphasized the intention that these general purposes were not to be unduly limited. The courts have given a broad construction to the Act in determining whether or not power exists to effectuate these general purposes.<sup>192</sup> This principle was well stated by the Commerce Court as follows:

"A statute of the scope of the interstate commerce act, designed to regulate the vast interstate transportation business of the country, is not to be narrowly interpreted in accordance with the economical or physical conditions prevailing at the time of its enactment."<sup>193</sup>

The outlook of the Commission must be as comprehensive as the whole country and as to all subjects within its prescribed authority it has power to make such orders as are necessary to enforce the great remedial purpose of the Act.<sup>194</sup>

§ 227. **Effect of Commission's Orders.**—When an award of damages is made "the findings and order of the Commission

192. *Interstate Com. Com. v. Goodrich Transit Co.*, 224 U. S. 194, 56 L. Ed. 729, 32 Sup. Ct. 436, reversing *Goodrich Transit Co. v. Interstate Com. Com.*, 190 Fed. 943, Opinion Com. Ct. Nos. 21-24, p. 95; *Kansas City S. Ry. Co. v. United States*, 231 U. S. 423, 58 L. Ed. 296, 34 Sup. Ct. 125, affirming same styled case, 204 Fed. 641, and sustaining accounting orders of the Commission.

193. *Omaha & C. B. Street Ry. Co. v. Interstate Com. Com.*, 191 Fed. 40, Opinion Com. Ct. No.

25, p. 147. This case was reversed but the principle quoted not referred to, *Omaha & C. B. Street Ry. Co. v. Interstate Com. Com.*, 230 U. S. 324, 57 L. Ed. 1501, 33 Sup. Ct. 890. See also *Lysaght v. Lehigh V. R. Co.*, 254 Fed. 351.

194. *Interstate Com. Com. v. Chicago, R. I. & P. Ry. Co.*, 218 U. S. 88, 54 L. Ed. 946, 30 Sup. Ct. 651; *Interstate Com. Com. v. Chicago, B. & Q. R. Co.*, 218 U. S. 113, 54 L. Ed. 959, 30 Sup. Ct. 660.

shall be *prima facie* evidence of the facts therein stated." Where orders other than an award of damages are made they are binding "unless \* \* \* suspended or set aside by a court of competent jurisdiction." In what cases and for what causes the courts may set aside these orders will be discussed in a subsequent chapter.

§ 228. **Commission's Control over Its Orders.**—The Commission is authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper, and it may grant rehearings. These powers will be discussed in the chapter on procedure of the Commission.

Until such orders are suspended or modified, it is the duty of every common carrier, its agent and employees, to observe and comply therewith.

The Commission, the United States by the Attorney-General, as well as parties to the orders made by the Commission, may apply to the United States District Courts for the enforcement of such orders.

§ 229. **Commission May Employ Attorneys.**—"The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interest in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission."

This power the Commission exercises, its attorneys appearing in investigations before the Commission or in advance rate cases and other investigations of general interest, and cases where orders of the Commission are involved.

§ 230. **Records of Commission.**—Copies of schedules and classifications and tariffs of rates, fares and charges filed with the Commission, and the statistics, tables and figures contained in the reports of carriers made to the Commission as required by law, are public records and shall be received as *prima facie* evidence of what they purport to be in investigations by the Commission and in all judicial proceedings,

and certified copies shall be received in evidence with like effect as the originals.

Section 14 of the Act makes the authorized publication of the reports and decisions of the Commission competent evidence. The Supreme Court held this not to mean that courts should take judicial notice of these reports and decisions, but that they were admissible without obtaining certified copies; otherwise, the rules of evidence were not changed.<sup>195</sup>

§ 231. **Valuation of Railroad Property.**—In the Eastern Advance Rate case,<sup>196</sup> Mr. Commissioner Prouty delivering the opinion of the Commission, speaking of the facts which must be considered in determining the question as to what net earnings the carriers are entitled, stated the well known principle: "Both the value of the property and what is a fair return upon that value must be considered," and then said: "Some states have authorized and even instructed their railway commissions to put a value upon the property of railways operating within their borders. In some instances the elements to be considered in determining that value have been prescribed by statute, and the effect of the valuation when made is indicated. This commission has no such authority. We cannot in this case fix in terms the value of any one of these railroads, nor would that value, if determined in this case, be binding in subsequent proceedings; but, manifestly, in order to decide the issue presented we must have a general notion of the value of the properties of these defendants and must form an idea of the elements which should properly enter into the determination of that value."

The opinion then proceeds to state and discuss the rules established in the Smyth-Ames case,<sup>197</sup> and to point out the benefit a knowledge of the value of the property "devoted to the public service" would be to the Commission.

Congress, by Act approved March 1, 1913, amending the Act to Regulate Commerce,<sup>198</sup> provided that the "Commis-

195. *Robinson v. Baltimore & O. R. Co.*, 222 U. S. 506, 508, 56 L. Ed. 288, 32 Sup. Ct. 114, affirming same styled case, 64 W. Va. 406, 63 S. E. 323.

196. *Advances in rates, Eastern*

*Case*, 20 I. C. C. 243, 256 to 277.

197. *Smyth v. Ames*, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418.

198. Sec. 19a of Act; Sec. 420, *post*.

sion shall \* \* \* investigate, ascertain and report the value of all the property owned or used by every common carrier subject to the provisions of this (the) act. \* \* \* The Commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this (the) Act in detail, and show the value thereof \* \* \*, and shall classify the physical properties, as nearly as practicable, in conformity with the classifications of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission."

§ 232. **Valuation, How Made.**—The valuation provided by the Amendment shall include in detail, (1) the original cost of all property to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods used and the reasons for their differences if any; (2) the original cost of all lands, rights of way and terminals and the present value of the same; (3) the same information as to property held for purposes other than those of a common carrier; (4) information relating to the issuance of stocks, bonds or other securities and other financial arrangements; and (5) information as to the value of gifts and grants. Except as provided by the statute, the Commission is given power to prescribe the method of procedure to be followed in the conduct of the investigation. The carriers are required to aid in the investigation by furnishing information and access to the sources thereof.

After such valuation is made, the Commission shall in like manner keep itself informed of all extensions and improvements or other changes in the condition and value of the property of such common carriers, revising its valuations from time to time to fit such changes.

Application may be made to the District Courts of the United States to compel a performance by the carriers of the duties placed on them by the Amendment.

§ 233. **Finality and Effect of Valuation.**—Provision is made for notice of the completion of the tentative valuation of the property before such valuation shall become final; protest may be filed thereto and hearings had.

After hearing, the Commission shall issue an order making a final valuation, which valuation shall be published, and when published it is *prima facie* evidence of the value of the property in all proceedings under the Act to Regulate Commerce. The valuation so fixed is subject to modification by the Commission.

In making its valuation the Commission disregarded the current value of the right of way. On appeal to the Supreme Court this ruling was held not to be a compliance with the statute.<sup>199</sup> The requirement of Section 15a added by the Transportation Act 1920 that rates must be established which under the circumstances stated shall yield five and one-half per centum on the fair value of the aggregate property makes the valuation powers of the Commission much more important.<sup>200</sup>

§ 234. **Office of Commission.**—The principal office of the Commission is in the city of Washington, where its general sessions are held. Its inquiries may be, and frequently are, prosecuted by one or more Commissioners or an examiner who may hold sessions in different parts of the United States. The testimony in cases is usually taken at some place most convenient to the parties interested; this is written out, and the Commission at Washington determines what order shall be entered.

§ 235. **Annual Reports from Carriers.**—The Commission is authorized to require annual reports from all common carriers of all railroads engaged in interstate commerce. The statute provides what these reports shall contain and gives the Commission authority to prescribe the manner in which such reports shall be made. The time for filing these reports may be extended by the Commission, which also has powers subject to the provisions of the Act and from the authority “by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the Commission is authorized or required by this or any other

199. *Kansas City So. Ry. Co. v. L. Ed. —, 40 Sup. Ct. —.*  
*United States*, 250 U. S. —, 64      200. *Sec. 15 a; Sec. 405 c, post.*

law to inquire or to keep itself informed or which it is required to enforce." Penalties and forfeitures are provided for a failure to comply with the orders of the Commission in this respect. Forms of accounting may also be prescribed, for violation of which prescribed forms penalties are provided.

The Commission may employ examiners to inspect accounts. False entries in, or willful destruction, mutilation or alteration, of accounts are prohibited.

The Commission may prescribe a time after which books, papers and documents may be destroyed. The Supreme Court held these provisions constitutional and applicable to water carriers engaged in interstate commerce.<sup>201</sup>

In the *Kansas City Southern* case,<sup>202</sup> in sustaining an order of the Commission made under authority of the section, the Supreme Court said: "In order that accounts may be standardized, it is necessary that the accounts of the several carriers shall be arranged under like headings or titles. \* \* \* So far as such uniformity requirements control or tend to control the conduct of the carrier in its capacity as a public servant engaged in interstate commerce, they are within the authority constitutionally conferred by Congress upon the Commission." It was there held that a requirement of the Commission that when existing shops and terminal facilities were abandoned and new ones erected, that there should be charged to operating expenses "the cost of replacing the abandoned property in kind, plus the cost of removal, but less the value of salvage," was not such an order as would be set aside by a court where the Commission had proceeded "with deliberation and after proper inquiry." And this was true although the apportionment of profits to preferred stockholders, would, as a result of such method, be less than they would otherwise be entitled to.

201. *Interstate Com. Com. v. Goodrich Transit Co.*, 244 U. S. 194, 56 L. Ed. 729, 32 Sup. Ct. 436, reversing *Goodrich Transit Co. v. Interstate Com. Com.*, 190 Fed. 943, Opinion Com. Ct. Nos. 21-24, p. 95.

202. *Kansas City S. Ry. Co. v. United States*, 221 U. S. 423, 58 L. Ed. 296, 34 Sup. Ct. 125, affirming same styled case, 204 Fed. 641, Opinion Com. Ct. No. 56, p. 641.

The Smith Case<sup>203</sup> further recognized the full powers of the Commission whose powers of investigating and supervision, said the Court: "Extend to all of the activities of carriers, and to all sums expended by them which could affect in any way their benefit or burden as agents of the public. If it be grasped thoroughly and kept in attention that they are public agents, we have at least the principle which should determine judgment in particular instances of regulation or investigation; and it is not far from true—it may be it is entirely true, as said by the Commission—that "there can be nothing private or confidential in the activities and expenditures of a carrier engaged in interstate commerce."

§ 236. **Examiners.**—The Commission may employ special examiners "to inspect and examine any and all accounts, records and memoranda" kept by carriers subject to the Interstate Commerce Acts. Any examiner who divulges any fact or information which may come to his knowledge during the course of examinations made by him, except in so far as he may be directed by the Commission or by a court or Judge thereof, is guilty of a crime and subject to a fine of not more than five thousand dollars, or imprisonment for a term not exceeding two years, or both.

And to carry out and give effect to the provisions of the Acts Regulating Interstate Commerce or any of them, the Commission may employ special agents or examiners "who shall have power to administer oaths, examine witnesses, and receive evidence."

Under these provisions, accountants are appointed as special examiners to examine the accounts and records of the carriers for the purpose of obtaining information to enable the Commission to perform its duties in the enforcement of the statute, and to aid in valuing the property owned or used by carriers subject to the Act.

There are examiners who hear the evidence and submit reports to the Commission in general investigations made by the Commission and upon complaints brought before the Commission. These act somewhat as masters in chancery and of these there are the special examiners and the attorney-examiners, the latter hearing evidence in the more important cases.

203. *Smith v. Int. Com. Com.*, 245 U. S. 33, 42, 43, 62 L. Ed. 135, 140, 38 Sup. Ct. 34.

§ 237. **Reports of the Commission.**—In addition to reports of investigations made by it, “the Commission shall, on or before the first day of December in each year, make a report, which shall be transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary; and the names and compensation of the persons employed by said Commission.”

§ 238. **Lake Erie and Ohio River Ship Canal.**—Section 17 of the Act to incorporate the Lake Erie and Ohio River ship canal provides that canals constructed thereunder shall be open to the use and navigation of all suitable and proper vessels or other water craft upon fair and equal terms, conditions, rates, tolls and charges; but all charges, rates, and tolls, must be equal to all persons, vessels and goods under classifications” to be established by the company and approved by the Interstate Commerce Commission. Rebates, drawbacks and discriminations, whether effected directly or indirectly, are prohibited and tariffs must be published, and not changed except after thirty days public notice; but the Commission may in its discretion and for good cause shown permit changes on less notice and may modify the requirements in respect to publishing and posting schedules.

§ 239. **Parcel Post.**—The statute approved August 24, 1912, authorized the Postmaster-General to reform “subject to the consent of the Interstate Commerce Commission after investigation” the classification of articles mailable as well as the weight limit, the rates of postage, zone or zones, and other conditions of mailability of articles under the law creating the parcel post.

§ 240. **Government Aided Railroads and Telegraph Companies.**—By Act August 7, 1888, all railroad and telegraph companies to which the United States has granted aid are required to construct, maintain and operate a railroad or telegraph line as may be prescribed by the act of incorporation, and furnish facilities without discrimination.

Complaint may be made to the Commission, or the Commission may act without complaint, to obtain a performance of these duties.

Penalties are prescribed for a failure to perform the duties required, and the "party aggrieved" by such failure may recover damages.

Reports are required as of other carriers subject to the Act.

Information may be given the Attorney-General by the Interstate Commerce Commission, upon which the Attorney-General must proceed judicially to enforce the forfeitures provided in the Act. Congress reserved the right to alter, amend or repeal the law.

§ 241. **Common Law Remedies, Continued.**—Nothing in the Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of the Act are in addition to such remedies.

The above provision was in the original Act of 1887, and has not been repealed by any amendment thereof or act supplemental thereto.

This provision must be construed conformably to the well established canons of statutory construction, and being construed with the whole law as required by such canons, it must be held to mean that where a common-law right cannot, consistently with the general purposes of the statute, be enforced, the injured party must obtain redress under and in accordance with the statute. Any other construction would destroy the general scheme intended to be effected by the enactment. No right is taken away, but where a method for determining the right is open under the statute, that method must be pursued to the exclusion of other methods. When the statute furnishes no remedy for a wrong, or where preliminary administrative action is unnecessary to determine the right, the common law remedies may be sought.<sup>204</sup>

204. *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916; *Texas & Pac. Ry. Co. v. Cisco Oil Mill*, 204 U. S. 449, 51 L. Ed. 562, 27 Sup. Ct. 358; *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 444, 51 L. Ed. 553, 27 Sup. Ct. 350;

*Southern Ry. Co. v. Tift*, 206 U. S. 428, 437, 51 L. Ed. 1124, 27 Sup. Ct. 709; *United States v. Pacific & Arctic R. Co.*, 228 U. S. 87, 57 L. Ed. 742, 33 Sup. Ct. 443; *St. Louis S. W. R. Co. v. Lewellen*, 192 Fed. 540. See also Secs. 294, 297, 298 A, 308 A, *post*.

## CHAPTER VI.

### PROCEDURE OF THE INTERSTATE COMMERCE COMMISSION.

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- 246. Railroad Owned Steamships.
- 247. Changes in Tariffs.
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§ 242. **Scope of Chapter.**—In the next preceding chapter there is a discussion of the powers and duties of the Interstate Commerce Commission. From this statement of these powers and duties it was seen that the jurisdiction of the Commission divides itself into those investigations, (a) which have to do with the general execution of the Commerce Acts in which parties are not directly involved and in which the whole public is interested, and (b) into investigations which, while affecting the whole public, more directly affect individuals who are parties to the proceeding.

It is the purpose of this chapter to discuss the procedural statutes and rules adopted and used in each of these kinds of investigations.

The Interstate Commerce Commission is not a court, and while it hears testimony from which it reaches conclusions and while some of its forms of procedure are analogous to those of a court, it is not and should not be embarrassed by purely technical rules.

§ 243. **Switch Connection.**—To invoke the authority of the Commission with reference to the installation and operation of switch connections, there must exist a failure by the carrier to perform its duty in this respect, an application in writing by a shipper tendering interstate traffic for transportation, or by an owner of a lateral branch line of railroad making complaint as provided in section 13 of the Act.

Upon which complaint the Commission shall hear and investigate and determine as to the safety, practicability and justification of such connections and the reasonable compensation therefor. After which the Commission may make an order directing a compliance with the law requiring such connection.<sup>1</sup>

While formerly the Commission could not compel a carrier to permit the use of its right of way by another carrier,<sup>2</sup> the power given by Transportation Act 1920 over car service and terminals authorizes the Commission under the terms stated in the Act to open terminals, spurs and switches to a joint use.

In requiring connections between rail lines and the dock of a water carrier the Commission has full authority to determine the terms and conditions upon which the connecting tracks, when constructed, shall be operated; and, in the construction or operation of such tracks it may determine what sum shall be paid to or by each carrier.<sup>3</sup>

§ 244. **Relief under Fourth Section.**—The fourth section of the Act prescribes a relation between long and short hauls and between through rates and aggregates of the intermediate rates. The section gives the Commission authority to grant relief from the absolute provisions of the statute. There must be an application to the Commission by the carrier showing a "special case," some special reason for the relief, upon which, after investigation, the carrier may be authorized "to charge less for longer than for shorter distances;" and the Commission may from time to time provide the extent to which the carrier may be relieved from the operation of the section. The first statement of authority to grant relief applies to that part of the section referring to the long and short haul; the second statement is general and applies to the "operation of this section." The making of the application stays the effect of the prohibition "until a determination of such application by the Commission."<sup>4</sup>

1. Sec. 1 of Act; Sec. 344, *post*.

2. Consolidated Pump Co. v. Lake Shore & M. S. Ry. Co., 27 I. C. C. 519.

3. Sec. 6 of Act; Sec. 376, *post*.

Re Wharf Facilities at Pensacola, Fla., 27 I. C. C. 252, 260.

4. Sec. 4 of Act; Sec. 350, *post*.

The carriers filed over eleven thousand two hundred applications with the Commission pursuant to the statute.

There is nothing in the "Act prescribing the form, contents or breadth" of applications filed thereunder, and the Commission held that blanket applications covering many deviations from the statute might be filed.<sup>5</sup>

The statute does not give arbitrary power to the Commission to permit or refuse exceptions, but its action "must be limited and conditioned upon the presence in special cases of conditions and circumstances which would make such exceptions legal and proper and in no wise antagonistic to the other provisions of the Act."<sup>6</sup>

That Congress could make an absolute prohibition of a greater charge for a longer haul than for the shorter, was stated by the Commission discussing the procedure under the section, and it was said that the burden of proof was on the carrier seeking relief from the statutory general rule, a burden that required proof not only of the cause of the lower rate at the longer distance point "but of the reasonableness of the rates applied to intermediate points."<sup>7</sup> It has already been shown that the reasonableness of the rate to the intermediate point must be considered, and in addition to that factor the Commission considers water<sup>8</sup> and market competition<sup>9</sup> and the fact, if a fact, that the road

5. Southern Furniture Mfg. Assn. v. Southern Ry. Co., 25 I. C. C. 379, 381. See Rule 18 of the Rules of Practice of the Commission: Sec. 285, *post*.

6. Railroad Com. of Nevada v. Southern Pac. Co., 21 I. C. C. 329, 341; Bluefield Shippers Assn. v. Norfolk & W. Ry. Co., 22 I. C. C. 519, 530; Inter Mountain Rate Cases, 234 U. S. 476, 58 L. Ed. 1408, 34 Sup. Ct. 986.

7. Re Application Southern Pac. Co., Long and Short Haul Docket 1243, 22 I. C. C. 366, 374. See also as to burden of proof: Bluefield Shippers Association v. Norfolk & W. Ry. Co., 22 I. C.

C. 519, 530; Janesville Clothing Co. v. Chicago & N. W. Ry. Co., 26 I. C. C. 628; Commercial Club of Duluth v. Baltimore & O. R. Co., 27 I. C. C. 639, 660.

8. Re Transportation of Wood, Hides and Pelts, Railroad Com. of Oregon v. Oregon R. & N. Co., 23 I. C. C. 151, 179; Bowling Green Business Men's Protective Assn. v. Louisville & N. R. Co., 24 I. C. C. 228, 240; Re Lumber Rates to Ohio River Crossings, 25 I. C. C. 50.

9. Kellogg Toasted Corn Flakes Co. v. Michigan Cent R. Co., 24 I. C. C. 604; Re Lumber Rates to Ohio River Crossings, 25 I. C.

reaching the longer distance point is a circuitous route." Mere railway competition was said to be ineffective to meet the burden on the carriers. The Commission, speaking of such competition and the resulting violation of the Act, said:

"So far as the facts before us disclose, this condition has been brought about entirely by competition between different railways serving New Orleans. If no other element enters into the situation this would probably be wrong."

The Transportation Act 1920 restricts the authority of the Commission, section 349, *post*. Under the amended Act the rate to the more distant point must be "reasonably compensatory," the circuitous line cannot charge more to intermediate points no longer distant than that of the direct line, than it charges to the more distant point and potential water competition shall constitute no authority to grant relief.

§ 245. **Water Competition.**—The last paragraph of section 4 which prohibits carriers from increasing rates which have been lowered to meet water competition "unless after hearing \* \* \* it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition," not only puts the burden on the carriers, but limits the reasons which are valid explanations of the increase by excluding as one of such "the elimination of water competition."

In order to make such increase the Commission must come after hearing.

Suspension of lake navigation during the winter months is not an elimination of water competition, and during these

C. 50, 59. In each of these cases the effectiveness of market competition was considered and decided.

10. Wright Wire Co. v. Pittsburgh & L. E. Ry. Co., 21 I. C. C. 64, quoting Judge Cooley's opinion first construing the original Fourth Section; Gile & Co. v. Southern Pac. Co., 22 I. C. C. 298, 302; Re Rates on Salt, 24 I.

C. C. 192, 195; Edwards & Bradford Lumber Co. v. Chicago, B. & Q. R. Co., 25 I. C. C. 93, 95 holding that a route exceeding the short line by 15 per cent was a circuitous route. See also Fourth Section Application in the Southeast, 30 I. C. C. 153, 32 I. C. C. 61.

11. Re Transportation Lime, 24 I. C. C. 170, 172.

months higher rail rates may be justified," although the explanation seems unsatisfactory.

Whether or not the paragraph puts the burden of justifying increases of rates that were lowered prior to the Amendment enacting it, effective June 18, 1910, is immaterial, as that burden exists to all rates advanced since January 1, 1910, by virtue of section 15.<sup>12</sup>

§ 246. **Railroad Owned Steamships.**—A rail carrier may not own or control a water carrier in competition therewith,<sup>14</sup> but jurisdiction is conferred upon the Commission to "determine questions of fact as to the competition or possibility of competition" upon application of a railroad company or other company praying for an order permitting the continuance of such ownership or control of vessels already in operation or permitting the installation of new service.

The Commission may on its own motion make such investigation and enter an order thereon. There must be a hearing and the order of the Commission is made final. On such hearing if the Commission shall be of the opinion that any such existing service by water "other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude nor reduce competition," it may extend the time during which such carrier controlled water vessels may be so operated. The water carriers must in that event file tariffs of their rates, schedules and practices. Such applications must be made before July 1, 1914, but may be considered and disposed of thereafter.<sup>15</sup>

§ 247. **Changes in Tariffs.**—Changes in rates, fares and charges or joint rates, fares and charges, may not be made except after thirty days notice to the Commission and to the public, but the Commission is granted a discretion "for

12. *American Insulated Wire & Cable Co. v. Chicago & N. W. Ry. Co.*, 26 I. C. C. 415, 416.

13. *Re Pig Iron Rates from Virginia*, 27 I. C. C. 343, 345.

14. Sec. 5 of Act; Sec. 203 *ante*; Sec. 353, *post*.

15. Sec. 5 of Act; Sec. 355, *post*. Sec. 203, *ante*.

good cause shown" to allow changes on less notice, and may modify the requirements in respect to publishing, posting and filing tariffs. This may be done in particular instances or by general order.<sup>16</sup>

Speaking of this provision the Commission said: "It is believed that this authority should be exercised only in instances where special or peculiar circumstances or conditions fully justify it. Confusion and complication must follow indiscriminate exercise of this authority." Clerical or typographical errors constitute good cause.<sup>17</sup>

General orders permit the reduction of a through rate to the aggregate of the intermediate locals and the filing of tariffs by new roads in less than thirty days.<sup>18</sup>

§ 248. **Forms of Tariffs.**—The power granted the Commission to determine and prescribe the form of tariff schedules and to change that form when expedient has been exercised by prescribing rules in Tariff Circular No. 18-A and supplements thereto.

§ 249. **Through Routes.**—After full hearing, on complaint, or upon its own initiative without complaint, the Commission may establish through routes and maximum joint rates between rail and water lines.<sup>19</sup>

Where a rail carrier enters into arrangements with any water carrier operating from a port of the United States through the Panama Canal or otherwise for the handling of through business between interior points in the United States and such foreign country, similar arrangements may be required with any or all other lines of steamships operating from the same port to the same foreign country.<sup>20</sup>

Orders with reference to action authorized as herein stated shall be served and enforced as orders under section 15 of the Act<sup>21</sup> and may "be conditioned for the payment of any

16. Sec. 6 of Act; Sec. 360, *post*.

17. Tariff Circular 18a, Rule 58, also prescribing a form of application to exercise the authority.

18. Tariff Circular 18a, Rules 56 and 57.

19. Sec. 377, *post*.

20. Sec. 6 of Panama Canal Act, par. (b); Sec. 377, *post*.

21. Sec. 6 of Act, par. (d); Sec. 379, *post*.

sum or the giving of security for the payment of any sum or the discharge of any obligation which may be required by the terms of" the order."

Power is also given the Commission, after hearing, with or without complaint, to establish through routes and joint classifications and joint rates and the divisions thereof, when there is a failure of the carriers so to do. This does not apply to connection between street electric passenger railways not engaged in the general business of transporting freight and railroads of a different character. In establishing such through route reference must be had to the entire line of a carrier."

Subject to the limitation stated in the statute the Commission has a discretion as to when it will order through routes." The complainant asking for a through route should show himself "capable financially and physically" of assuming the obligations such routes would impose."

In fixing the divisions between the carriers the Commission must "take into consideration all the circumstances, conditions, and equities." "

§ 250. **Complaints for Damages.**—In claims for damages a complaint must be filed with the Commission. This complaint frequently seeks to have a particular rate or practice declared illegal, and in the same complaint asks for an order fixing the Commission's finding as to the amount of damages the complainant is entitled to recover. It is not proper to divide up a complaint by first asking a finding that the rate or practice is illegal, and thereafter, by supplemental complaint, to seek damages."

22. Last par. Sec. 6; Sec. 380, *post*.

23. Sec. 15 of Act; Sec. 195, *ante*; Sec. 401, *post*.

24. *Crane Iron Works v. United States*, 209 Fed. 238, Com. Ct. Opinion No. 55, p. 453, 461, cited, *Truckers Transfer Co. v. Charleston & W. C. R. Co.*, 27 I. C. C. 275.

25. *Truckers Transfer Co. v. Charleston & W. C. R. Co.*, 27 I.

C. C. 275; *Enterprise Transportation Co. v. Pennsylvania R. Co.*, 12 I. C. C. 326. *Baltimore & Carolina S. S. Co. v. A. C. L. R. Co.*, 49 I. C. C. 176.

26. *Star Grain & Lumber Co. v. Atchison, T. & S. F. Ry. Co.*, 14 I. C. C. 364, 370. See also section 196, *ante, post*, sec. 397.

27. *Dallas Freight Bureau v. Gulf, C. & S. F. Ry.* 12 I. C. C. 223, 228.

Many informal complaints for damages are filed and allowed. These are in cases where the carriers concede that an award should be made." Informal complaints are sufficient to give the Commission jurisdiction." The general principles applicable to the question are stated by the Commission to be the intent of Congress to provide a method of obtaining an award of damages without resort to the expensive and tedious processes of the law, and that the Act should be construed with that view."

The Commission prescribes rules to which it adheres. These rules are copied section 270, *post*. Where informal complaints are filed as provided in the Rules of Practice, and relief denied on the informal docket, a formal claim must be filed within six months of such denial, if the two years have expired, else the claim will be regarded as abandoned.

§ 251. **Same Subject—Order of Commission.**—Until the act complained of is found to be violative of the law no award of damages can be made. In the procedure before the Commission evidence is heard as to the illegality of the rate, regulation or practice under investigation and as to the fact of damages. If, after the hearing, it is found that complainant or one in whose behalf the complaint is filed has suffered injury by a violation of the law and the fact of legal damage is established, the Commission directs how proof of the amount of damages shall be made, and when such amount is ascertained an order therefor is made. What must be shown to fix this amount is stated by the Commission as follows:

"The complainants will be expected to prepare statements showing as to each shipment upon which reparation is claimed the date of movement, the point of origin, the point of destination, the route, the weight, the car number and initials, the rate applied, the charges collected, and the amount of reparation claimed. These statements, with the freight

28. Conference Ruling 396, Feb. 10, 1913. Delaware, L. & W. Ry. Co., 21 I. C. C. 45.

29. Marian Coal Co. v. Delaware, L. & W. Ry. Co., 27 I. C. C. 441; Mountain Ice Co. v. Bureau, 27 I. C. C. 32, 37. 30. Michigan Hardwood Mnfrs. Assn. v. Transcontinental Freight

bills covering the shipments, should be submitted to the defendants for verification by them. Upon the receipt of statements so prepared by the complainants and verified by the defendants, the Commission will take the matter up with a view to the issuance of an order of reparation.”<sup>31</sup>

This rule has been elaborated and is now rule 5 of Rules of Practice section 272, *post*.

In case damages are awarded the Commission must make a report and state the findings of fact on which the award is made,” and on a trial in court to recover on such award the findings of fact set forth in such report shall be *prima facie* evidence of the matters therein stated.”

§ 252. **General Investigation.**—In the exercise of its power to obtain complete information necessary to enable it to perform the duties and carry out the objects for which it was created, the Commission makes investigations into the management of the business of the carriers subject to the provisions of the Commerce Acts. This authority extends to any matter or thing concerning which a complaint is authorized to be made or about which any question may arise or which relates to the enforcement of any provisions of the Act.”

No particular form of procedure is prescribed for these investigations, but in a similar kind of investigation, that fixing accounting regulations, the Supreme Court stated as a material fact that the investigation proceeded “with due deliberation and after proper inquiry.”<sup>32</sup> The Bills of Lading and Industrial Railways cases are illustrative of investigations without formal complaint.”

31. *Standard Mirror Co. v. Pennsylvania R. Co.*, 27 I. C. C. 200, 209.

32. Sec. 14 of Act; Sec. 394, *post*.

33. Sec. 16 of Act; Sec. 406, *post*; *Lehigh Valley R. Co. v. Clark*, 207 Fed. 717, 125 C. C. A. 235; *Mills v. Lehigh Valley R. Co.*, 238 U. S. 473, 59 L. Ed. 1414, 35 Sup. Ct. 888.

34. *ante*, Secs. 219, 220.

35. *Kansas City S. Ry. Co. v. United States*, 231 U. S. 423, 58 L. Ed. 296, 34 Sup. Ct. 125.

36. *Re Bills of Lading*, 14 I. C. C. 346; *Re Bills of Lading*, 29 I. C. C. 417; *Industrial Railways Case*, 29 I. C. C. 212; *Second Industrial Railways Case*, 34 I. C. C. 596, 55 I. C. C. 469, 56 I. C. C. 272, 52 I. C. C. 671.

Investigations relating to consolidation of railroads, to extensions and abandonment of facilities and to determine groups on the aggregate value of the roads in which fair return shall be based, are among the things which may be investigated under Transportation Act 1920.

§ 253. **Procedure in Formal Cases—Complaint.**—The rules relating to formal complaints and the form thereof are stated in subsequent sections of this chapter.” By conference ruling the Commission has provided that complaints involving the same or substantially the same principle, subject or state of facts should be included in one complaint; that where the principle involved or the state of facts is substantially the same, two or more complainants may join against two or more carriers in one complaint, and where in such cases two or more complaints have been filed they may be consolidated and heard together.” Amendments are freely allowed, even to the extent of claiming reparation when there is no claim therefor in the original complaint.”

While the Commission's practice is in no degree technical, issues not clearly raised in the pleadings cannot be determined by it. The Commission has said: “A party litigant must by his pleading fairly advise his adversary of the contention which the latter will be expected to meet at the hearing, in order that we may be adequately informed on the resulting record of the facts material to our determination of the controversy. This principle of notice and a fair opportunity for defendant to know what charges he must meet is substantially conformed to when the course of the hearing unobjected to shows definitely what complainant seeks.” Good faith both on the part of the complainants and defendants demands that the formal pleadings shall be sufficiently full to disclose the claim

37. Secs. 268, *et seq.*

38. Conference Ruling 206.

39. *Virginia-Carolina Chemical Co. v. St. Louis, I. M. & S. R. Co.*, 18 I. C. C. 1; *Virginia-Carolina Chemical Co. v. Chicago, R. I. & P. Ry. Co.*, 18 I. C. C. 3.

40. *Commercial Club of Omaha v. Chicago, R. I. & P. Ry. Co.*, 6 I. C. C. 647; *Sinclair & Co. v.*

*Chicago, M. & St. P. Ry. Co.*, 21 I. C. C. 490; *Board of Trade of Chicago v. Atchison, T. & S. F. Ry. Co.*, 29 I. C. C. 438, 444. *Burson Knitting Co. v. C. M. & G. R. Co.*, 42 I. C. C. 739, 742; *Live Poultry & Dairy Shippers Traffic Asso. v. A. T. & S. F. Ry. Co.*, 49 I. C. C. 228, 230.

or the answer thereto. For a defendant in its answer to say that it neither admits nor denies an allegation the truth or falsity of which could be determined from its records, is not to deal frankly with Commission or complainant, and the complaint should be sufficiently definite to inform the defendant what rate, rule or practice is complained against, and upon what is based the claim of illegality.

§ 254. **Notice before Hearing.**—To constitute that full hearing required by the statute notice must be given to the carrier directly affected. Where a complaint is filed a statement thereof must be forwarded to the carrier complained against, “who shall be called upon to satisfy the complaint, or to answer the same writing.” “

In hearings without formal complaint where an order against or affecting a particular carrier or carriers, as in suspension and similar cases, is contemplated, notice must be given.

Most rate situations have their influence on other rates and, having this fact in mind, objection was made to an order of the Commission because all carriers thus affected were not served with notice. Replying to the contention, the court said:

“It is obvious that the purpose was to require that notice should be given to the party immediately interested, and not to those remotely concerned. It is a novel and unreasonable proposition that, when rates in a given locality are drawn in controversy, notice must be given to every carrier who may be in the succession of all or any interstate transportation which includes that in question. The procedure prescribed is analogous to that in all legal controversies, and must be deemed sufficient. The objections must be overruled.

“If such an order as is here contested were to be held to be beyond the power of the commission, and that precedent were to be followed, its functions would be frittered away, piecemeal, and the result must be that the power to regulate rates through the means provided by the statute would be

41. Sec. 13 of Act; Sec. 392, *post*; *Fels & Co. v. Pennsylvania R. Co.*, 23 I. C. C. 483, 486.

so absurdly inadequate as to furnish no reason for its existence." 42

Speaking of the same question the Commission said:

"The fact that all of the carriers operating in the Mesaba district and all of the carriers and parties interested in the ore rates are not made parties to this proceeding is immaterial in its bearing upon the legality of this complaint. A complainant can not be expected to search public and private records with the view of discovering all parties that may be interested in a certain proceeding. Full publicity attends every step of all proceedings before the Commission, and it must be assumed that parties interested will take notice of what is going on. Other parties interested may intervene in the present proceeding if they so desire."

The quoted rule must be read in connection with what the Commission said in the Stevens Grocery Co. case. There it was said: "At the hearing defendant objected to the sufficiency of the complaint because the carriers parties to the movement east of Memphis were not named as defendants. Numerous cases were referred to by parties as supporting their contentions that it is, or is not proper and necessary to bring in issue the through rate or charge and to name the carriers parties thereto, before attacking a factor of such through rate or charge. In the past the procedure in this respect has been varied somewhat, dependent upon the circumstances of the cases. It is important that the true rule be definitely announced and that a uniform policy be established under which parties complainant and defendant may understand what is required. We now lay down the rule, which for the future will be strictly adhered to, that when a complaint involves charges applicable to a through shipment the through rate or charge must be brought in issue and the participating carriers must be made defendants. When the through rate or charge is made up of sepa-

42. Louisville & N. R. Co. v. Int. Com. Com., 184 Fed. 118, 127, 128. For further history of the case see, Louisville & N. R. Co. v. Int. Com. Com., 195 Fed. 541,

Opinion Com. Ct. No. 4, p. 235, 375; Int. Com. Com. v. Louisville & N. R. Co., 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185.

ately established rates or charges, applicable to the through business, the through rate or charge must be attacked as violative of the Act, although the violation may be believed to be occasioned by a particular factor, or factors thereof; in such case the complaint should be prepared at the hearing to prove the unlawfulness of the through rate itself and that this is due to a particular factor or factors. The sound rule on this point was followed in *Commercial Club of Omaha v. A. S. R. Ry. Co.*, 27, I. C. C. 302; *Scott-Mayer Commission Co. v. C. R. I. & P. Ry. Co.*, 28 I. C. C. 529; and *Pöehlman Bros. Co. v. C. M. & St. P. Ry. Co.*, 30 I. C. C. 89. That rule will be followed consistently hereafter."

Later in referring to this case the Commission said: "The Rule is stated in the *Stevens Grocer Co.* case more broadly than it should be. In determining whether or not a complainant has been damaged by the exaction of unreasonable or unduly preferential reshipping rates the total through charges paid from point of origin must be considered. But this does not hold true of a determination of the reasonableness or justness of the reshipping rate itself. Reshipping rates are not merely divisions of through rates, but are separately established rates generally published by carriers other than those engaged in the inbound movement and without the concurrence of the latter; and the point of reshipment is a rate-breaking point. A change in the reshipping rates, even though it may affect the through charges, will have no effect upon the inbound rates. The inbound carriers have a right to secure reasonable compensation for their part of the haul by reasonable inbound rates. The reasonableness of such inbound rates is in no manner contingent upon reshipping rates. Furthermore, inbound rates used in connection with reshipping rates generally serve also as local rates hence they are subject to review independently of the outbound rates."

As complainants have not always applied the rules and have at times lost reparation claims by not making proper parties the decisions of the Commission are rather fully quoted. "

43. *Lum v. Great Northern R. Co.*, 21 I. C. C. 558, 561, 562. And see, *Whiteland Canning Co. v. Pittsburg, C. C. & St. L. Ry. Co.*,

§ 255. **Formal Complaints—Answer.**—The statute requires the defendant to answer the complaint in writing, but neither the statute nor the rule of the Commission hereinafter given states the substance of what the answer shall contain. The word itself connotes the idea of stating what the facts are with reference to the allegation of the complaint. This answer is due “within a reasonable time,” to be specified by the Commission, the time being specified in the rule of the Commission as thirty days after service by defendants whose general offices are west of El Paso, Texas, Salt Lake, Utah, or Spokane, Washington, and twenty days by all other defendants.”

No technical demurrer is necessary but the legal sufficiency of the complaint may be determined on a motion to dismiss, the practice being analogous to Federal Equity Rule 29.

The statute provides that, “no complaint shall at any time be dismissed because of the absence of direct damage to the complainant,” so a motion to dismiss the complaint of one not then a shipper, but professing an intention to become such, was denied; nor does the complainant have to come before the Commission with clean hands as in a court of equity. “

§ 256. **Hearings by the Commission.**—When complaint is filed and served, the Commission is given discretion “to investigate the matters complained of in such manner and by such means as it shall deem proper.” “On all hearings the Commission has “power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements and documents relating to any matter under investigation.” Such attendance of witnesses, and the production of such documentary evi-

23 I. C. C. 92, 93. But a participating carrier to a tariff attacked is a necessary party, *Reno Grocery Co. v. Southern Pac.* 23 I. C. C. 400. *Stevens Grocery Co. v. St. L. I. M. & S. Ry. Co.*, 42 I. C. C. 396, 398; *Cairo Board of Trade*, 46 I. C. C. 343, 350, 351.

44. See Rules of Commission, Secs. 268, *et seq.* This chapter; Sec. 13 of Act; Secs. 392, *post.*

45. *Lum v. Great Northern R. Co.*, 21 I. C. C. 558.

46. Sec. 13 of Act; Sec. 393, *post.*

dence, may be required from any place in the United States, at any designated place of hearing. The claim that testimony may incriminate the witness is no excuse for not testifying, but the witness's testimony shall not be used against him on the trial of any criminal proceeding." Testimony may be taken by depositions at the instance of any party, or by order of the Commission.<sup>47</sup> Witnesses summoned before the Commission are entitled to the same fees and mileage as are paid witnesses in the courts of the United States.<sup>48</sup>

The Commission is very liberal in its practice with reference to admitting testimony, "and," said Mr. Justice Lamar, speaking the opinion of the Supreme Court, "is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits by private parties." In the same case it was said: "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. \* \* \* All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal."<sup>49</sup>

The same principles were applied by the Supreme Court in another case, in which it was indicated that parties were not bound by findings based upon specific investigation made in a case without notice to them.<sup>50</sup>

Any party may appear before the Commission and be heard, in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public at the request of either party. Any

47. Sec. 12 of Act; Sec. 390, *post*; Sec. 3 of Elkins Act; Sec. *post*, 457; Compulsory Testimony Act, *post*, 480; Immunity of Witnesses Act, Sec. 479, *post*.

48. Sec. 12 of Act; Sec. 390, *post*.

49. Sec. 18 of Act; Sec. 418, *post*.

50. *Int. Com. Com. v. Louisville & N. R. Co.*, 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185, and cases cited. *Atchison T. & S. F. Ry. Co. v. Spiller*, 246 Fed. 1, 158 C. C. A. 227.

51. *United States v. Baltimore & O. R. Co.*, 226 U. S. 14, 57 L. Ed. 104, 33 Sup. Ct. 5.

one of the members of the Commission may administer oaths and affirmations and sign subpoenas."

§ 256a. **Proposed Reports.**—Upon the suggestion of the writer hereof the Commission in *McCormick Co. v. S. P. Co.*, 37 I. C. C. 234 served the respective parties with a copy of the report proposed by the Attorney Examiner. This practice then inaugurated proved helpful and later was generally adopted and the Commission issued rules as follows:

"1. If oral argument before the presiding commissioner or examiner is desired he should be notified at or before the hearing and may arrange to hear the argument at the close of the testimony within such limits of time as he may determine, having regard to other assignments for hearing before him. Such argument will be transcribed and bound with the transcript of testimony, and will be available to the Commission for consideration in deciding the case. The making of such argument shall not preclude oral argument before the Commission, or a division thereof, and application therefor may be made as hereinafter provided.

"2. Only one initial brief shall be filed by each party. The presiding commissioner or examiner shall fix for all parties the same time within which to file their briefs. Reply briefs are not permitted at this stage.

"3. After expiration of the time set for briefs, the presiding or participating examiner will prepare his proposed report containing the statement of the issues and facts and the findings and conclusions which he thinks should be made. This proposed report will be served by mailing copies to the parties attorneys who appeared at the hearing or upon brief, except that in general investigations copies may also be mailed in the Commission's discretion to other parties whose appearances are noted of record.

4. Within twenty days after service of the proposed report any party may file and serve, in the manner prescribed for briefs in Rule XIV of the Rules of Practice exceptions to the examiner's proposed report and brief in support of the exceptions. Exceptions and brief should be con-

tained in one print. Within ten days after the expiration of the time so fixed briefs in reply to the exception briefs may be filed and served, but will not be accepted later except upon leave granted upon application therefor. Applications for oral argument before the Commission or a Division thereof if made by a party filing exceptions must accompany the exceptions, or if made by a party not filing exceptions must be filed not later than 10 days after the time fixed for filing and service of exceptions.

“Parties or Attorneys at El Paso, Tex., Salt Lake City, Utah, Spokane, Wash., or points west thereof, who appeared at the hearing or upon brief, will be allowed five days additional time for filing and serving exceptions, exception briefs and reply briefs respectively.

“5. Exceptions to the examiner’s proposed report either as to statement of facts or matter of law should be specific. If exception is taken to matters of law or conclusions the points relied upon should be stated separately and clearly. If exception is taken to any statement of fact reference should be made to the pages or parts of the record relied upon and a corrected statement incorporated in the exception brief.

“6. In the absence of exceptions that are sustained or of ascertained error the statement of the issues and of the facts by the examiner will ordinarily be taken by the Commission as the basis of its report.”

**§ 257. Orders Relating to Rates and Practices.**—By formal complaint as hereinbefore stated, or on its own initiative in extension of a complaint, or without any complaint whatever, after full hearing, the Commission when “of opinion” that any individual or joint rates or charges whatsoever demanded, charged or collected, or that any individual or joint classifications, regulations or practices are unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise violative of the Commerce Act, may prescribe joint and lawful rates, rules and charges for the future as maximum rates or minimum or maximum and minimum and may likewise prescribe just and reasonable

regulations. And the Commission, the carriers failing to agree, may prescribe the division of joint rates." To do this there must be a full hearing and the "opinion" of the Commission must be based upon evidence as in formal complaints." All orders of the Commission under this authority shall take effect in some reasonable time, to be prescribed by the Commission, not less than thirty days.

§ 258. **Suspension of Rates.**—A new individual or joint rate, fare, or charge, or a new individual or joint classification, regulation or practice affecting any rate, fare, or charge, may, upon complaint, or on the initiative of the Commission without complaint, and without answer or other formal pleadings, be suspended by the Commission and when the suspension is had the Commission must enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation or practice. When the suspension is ordered, a statement in writing of the Commission's reasons therefor must be filed with the schedule involved and delivered to the carrier or carriers affected thereby.

The first suspension can not be for longer time than one hundred and twenty days, although where the hearing can not be completed in that time, the time may be further extended for not exceeding thirty days. The hearing and decision in suspension cases must be given preference over all other questions pending before the Commission and must be decided as speedily as possible.

"At any hearing involving a rate fare or charge increased after January 1, 1910, \* \* \* the burden to show that the increased rate fare or charge or proposed increased rate fare or charge is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible." "

Any new practice which results in increasing the rate is within the provision fixing the burden of proof on the carrier,

53. Sec. 15 of Act; Secs. 395, and 397, *post*.

54. Sec. 256, *supra*.

55. Sec. 15 of Act as amended by Act of June 18, 1910; Secs. 398, 399, *post*. The Commission

although it would seem that a new tariff provision not affecting the rate while subject to suspension would not be within the burden of proof clause."

Ordinary cases are given in practice a Docket number. Suspension cases are distinguished as Investigation and Suspension Docket, and given consecutive numbers.

**§ 259. Practice in Suspension Cases Where There Exist Intrastate Rates Lower than Proposed Interstate Rates.—**

When it is made to appear that proposed increased rates, although shown to be just and reasonable under section one of the Act, will, if they become effective, be higher than intrastate rates for related and competitive hauls, what should be the order of the Commission? In some states maximum intrastate rates are prescribed by legislative act, and the maximum fixed cannot be exceeded until legislative authority is obtained. In other states rates are fixed by a commission, in some of which proposed increases may be suspended by the Commission under a practice similar to that obtaining with the Interstate Commerce Commission, in others of such states permission must be obtained from the state commission before publishing the increased rates. Obviously it is not always legally possible for carriers simultaneously to advance interstate and intrastate rates. If increases are denied in one class of rates because not effective in the other class, no increase can ever be made, and the state authority by refusing advances in the state rates could fix the limit of interstate rates. This may not legally be done." The answer to the foregoing question was made by the Commission

in Tariff Circular 18-A, p. 21, prescribed as a rule for carriers: That when a rate is suspended, the carrier must *immediately* file with the Commission a statement stating that fact. Where only a part of a tariff is suspended, the carrier must file with the schedule suspended a copy of the suspending order. When a suspension is vacated, a statement

of that fact must likewise be filed by the carrier.

56. Re Advances in Rates on Soft Coal, 23 I. C. C. 518, 519; Re Advances on Lumber and Forest Products, 21 I. C. C. 455, 456. See also Sec. 223, *ante*.

57. Houston, Tex. Ry. Co. v. U. S., 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833.

as follows:" "The protestants contend that, should the proposed change of rating become effective, the increased rates would result in unjust discrimination against interstate shipments of live poultry to St. Paul and Minneapolis, Minn., because of existing lower intrastate rates in Minnesota. The respondents answer that in the event proposed rates are permitted to become effective it is their purpose to bring about substantially similar increases in their intrastate rates. If the protestants or other shippers of live poultry should feel aggrieved by discrimination which may result from rates established because of our finding in this case, the way will be open by formal complaint to the Commission, as in other cases, to obtain relief from such discriminations as may be found to be unlawful." The rule just stated was applied in the Five Per Cent case," where it appeared that very low intrastate rates were not increased, notwithstanding which increases in interstate rates were permitted.

In another case" an interstate rate of  $5\frac{3}{4}$  cents was found to have been justified, although the state rate for a similar haul in the same territory was but  $3\frac{1}{2}$  cents. The Commission refused to reduce an interstate rate where the claim for such reduction was based upon the facts of the existence of lower intrastate rates, and declined to pass upon the question of discrimination because that question was not the specific issue presented. There it was said:" "If any rate for transportation wholly within a state may be made the measure of the rate when that transportation moves from one state through or into another, the interstate rate so resulting would not be regulation of interstate commerce by the authority prescribed by the Constitution, but by the state. If the function of this Commission be to compute the sum of intrastate rates and prescribe the result as the measure of interstate rates, actual and direct regulation of interstate commerce by the states would be the result. That in the

58. Rates on Poultry in Western Trunk Line Territory, 32 I. C. C. 380.

59. Five Per Cent Case, 31 I. C. C. 351.

60. Hans Rees' Sons v. S. Ry. Co., 30 I. C. C. 585.

61. Corporation Com. of Okla. v. A., T. & S. F. Ry. Co., 31 I. C. C. 532, 540, 541.

regulation of interstate commerce by the general government and of intrastate commerce by the state governments there result inconveniences and anomalies, such as is contended to exist here, might be conceded; but such facts, if they exist neither deprive us of the power nor relieve us from the duty of performing the obligations imposed upon us by laws of Congress authorized by the Constitution of the United States. Were we at liberty and inclined to abdicate the authority and abandon the duty imposed upon us by accepting the sum of state rates as a measure of interstate rates, the difficulty would not be removed."

Where the claim was made that interstate rates could be increased upon proof that intrastate rates were higher than the interstate rates proposed to be advanced, the Commission said:" "Unquestionably the law of Minnesota presents a situation to the carriers which makes it necessary for them either to adjust some interstate rates to the mileage rates prescribed by that law, to leave their intrastate and interstate rates out of line or to suffer material reductions below the intrastate rates fixed thereunder. While we may consider this fact, "Congress does not directly or indirectly interfere with local rates by adopting their sum as the interstate rate,' *L. & N. R. R. Co. v. Eubank*, 184 U. S. 27, 42 and we cannot say that merely because a higher intrastate rate exists that an increase of an interstate rate to meet the state-made rate is justified, even though the transportation conditions as to distance and territory are similar. Nor do the facts here presented require that we consider the application of the decision of the Supreme Court in the *Shreveport Case*, *H. E. & W. T. Ry. Co. v. United States*, 234 U. S. 342."

The cases discussed show the rule, which until the decisions now to be referred to were rendered, was followed by the Commission. Where a gateway was sought to be closed for interstate traffic although left open for intrastate traffic, the Commission held that the tariff proposing the change should be canceled. While some of the language used in

the opinion is apparently not consistent with prior decisions of the Commission, the order can be justified on the ground that the proposed tariff was unlawful under section one of the Act."

In discussing live stock rates the Commission without reference to any of the cases cited above, said:" "The incongruity between the proposed interstate rates and intrastate rates is a circumstance which goes vitally to the propriety of the rates under suspension. To dispose of this issue it is necessary to have before us the facts and circumstances surrounding the establishment of these intrastate rates." In the 1915 Western Advance Rate case" the majority of the Commission, Mr. Commissioner Harlan and Mr. Commissioner Daniels dissenting, applied the rule that lower intrastate rates may justify denying increases in interstate rates in the proposed increases in the rates on live stock and packing house products, but not to the proposed increases in the rates on coal and the increased car load minimum in grain products. The principles stated in the quotations above cannot, when taken from their setting, be harmonized. The Commission does not apply the rule *stare decisis* and considering what was done in the several cases rather than what was said, it may be stated that when a carrier seeks to justify increases in its rates and the claim is made or the fact appears that there exist lower intrastate rates on the same commodity in the same general territory, the safe course is to make full proof showing the reasons for the existence of the lower rates and explaining why they have not been increased. In all cases where this relationship of interstate rates higher than intrastate rates exists, the protesting shippers should present the fact supported by such proof as is available. When the proof is made, the Commission upon a consideration of "all the facts and circumstances," will exercise its "flexible limit of judgment," permitting or denying the increases, as may seem just and proper in each case. A definite and uniform rule like that

63. Class Rules between Stations in Louisiana, 33 I. C. C. 302.

64. Live Stock Rates from Colorado, 35 I. C. C. 682, dissenting opinion, pp. 689-691.

65. Western Rate Advance Case 1915, 35 I. C. C. 497. For the discussion in the dissenting opinion, see pp. 654, *et seq.*

stated in the Live Poultry case, *supra*, is advisable and in Danville, Va., Class and Commodity Rates, 38 I. C. C. 742, was stated by Mr. Commissioner Harlan. This correct rule seems to have been accepted and former cases applying a contrary rule ignored in a second Live Poultry Case, 49 I. C. C. 228, 237 the correct rule is stated and the Commission said: "This ruling we have since followed."

§ 260. **The Weak and the Strong Roads.**—Rates between the same points must, as a practical matter, be the same over all lines connecting the points, otherwise the line maintaining the lowest rates would receive all the business. When rates in a general and related territory are increased the increases must, to be of any benefit to the carriers, apply to all carriers serving the territory. It not infrequently occurs that in the general territory there are carriers whose need for additional revenue is indubitable; other carriers may be earning a fair return on their investments while as to others the need for additional revenue is uncertain. To consider the weak roads or the strong roads only would manifestly be unfair either to the public or to the investor in railroad property. Under such circumstances it has been the rule of the Commission to measure the need for additional revenue by the condition of a road which is fairly representative of the general situation. This is manifestly proper, as each road, the weak and the strong, is necessary to the public service and to destroy the weak road because there may be a road in the same territory which needs less revenue, benefits a few but injures the many. Perhaps it might be proper that there should be regulation limiting the construction of a road where the territory is already sufficiently served by existing transportation facilities; but so long as the law permits the construction of roads and denies the right to pool freights, justice will permit the needs of the roads so constructed to be considered in prescribing rates for a related section. In the general rate advance cases heretofore heard by the Commission, these principles have been announced, and in the Western Advance Rate case of 1915, 35 I. C. C. 497, 560 561, the authorities are collated.

In Transportation Act 1920 Congress recognized the prin-

ciples stated in this section in section 15-a relating to "fair return" on "aggregate value."

§ 261. **Other Orders.**—The procedure in prescribing through routes and joint rates may be on complaint or without complaint," and so with the procedure to determine the maximum to be paid a shipper for services rendered or facilities furnished in connection with transportation." In each case there must be a hearing.

§ 262. **Service of Orders of the Commission.**—Every order of the Commission shall be forthwith served upon the designated agent of the carrier."

Every carrier must designate in writing an agent in the city of Washington, District of Columbia, upon whom service of all notices and processes may be made and file such designation with the Secretary of the Commission, and, in default of such designation, service of any notice or other process in any proceeding before the Commission may be made by posting such notice or process in the office of the Secretary of the Commission."

The Commission has an official seal, which the law prescribes shall be judicially noticed."

§ 263. **Rehearing by the Commission.**—The Commission has authority to suspend or modify its orders upon notice, the manner of acting and the kind of notice being left to its discretion. Section 16-a gives the Commission power to grant rehearings under such general rules as it may prescribe, but unless specially permitted otherwise, the order must be obeyed pending such rehearing. This section was added by the amendment of June 29, 1906, but the power has been exercised by the Commission since its organization.

In re Petition of Produce Exchange,"<sup>66</sup> a rehearing was denied the petitioner, who was not a party on the original hearing. In *Myers v. Penn. Co.*<sup>72</sup> the rehearing was denied,

66. Sec. 15 of Act; Sec. 400, *post*.

67. Sec. 15 of Act; Sec. 404, *post*.

68. Sec. 16 of Act; Sec. 410, *post*.

69. Sec 6, par. 2 of Act June 18, 1910; Sec 450, *post*.

70. Sec. 17 of Act; Sec. 417, *post*.

71. Re Petition of Produce Exchange, 2 I. C. C. 588, 2 I. C. R. 412.

72. *Myers v. Pennsylvania R.*

the petition not showing that any material testimony had been overlooked or misapprehended and no error of law being disclosed. In overruling the first motion for rehearing filed with the Commission, Judge Cooley, its then chairman, announced this rule in relation thereto:"

"(a) The Commission will promptly and carefully examine an application for a rehearing with a view to the immediate correction of any error of law or fact found to exist, but will not direct a rehearing involving the expense to parties of appearing before the Commission for a reargument, unless satisfied that such reargument might have the effect of changing the result of what the Commission has already done.

"(b) The statute is construed as dealing with the substance of things, and as contemplating, as far as that is possible, methods of procedure that are speedy and which come at once to the very right of questions arising in the transportation of persons and freight."

On a petition asking a rehearing in a case decided before the Hepburn amendment, so that an order could be made under section 15, as amended, the Commission held that a case closed prior to the effective date of the Amendment of June 29, 1906, could not be reopened to enter an order authorized by the amended law."

§ 264. **Valuation of Property.**—The power given the Commission by Act March 1, 1913, to classify, inventory and value the property of carriers subject to the Act has been stated." The statute gives the Commission power to prescribe the method of procedure to be followed in the conduct of the investigation, the form in which the results shall be submitted, and the classification of the elements that constitute the ascertained value.

§ 265. **Oral Argument.**—By rule 14 of the rules of practice it is provided: "Oral argument will be had only as ordered by the Commission."

Co., 2 I. C. C. 573, 2 I. C. R. 403, 544.

73. Riddle, Dean & Co. v. Pittsburgh & L. E. R. Co., 1 I. C. C. 490, 1 I. C. R. 778.

74. Cattle Raisers' Assn. v. Chicago, B. & Q. R. Co., 12 I. C. C. 6.

75. Secs. 231-233, *supra*. Kansas City Sou. Ry. Co. v. United States, 251 U. S. —, 64 L. Ed. —, 40 Sup. Ct. —.

In speaking of oral argument the Commission said:

"The act provides for the taking of testimony in these investigations by a single commissioner or by an examiner. It is probable that the Commission might, in its discretion, require the submission of a case upon the testimony so taken and written briefs. However this may be, we have never, in fact, yet refused, and should only refuse under peculiar and unusual circumstances, the application of a party to be heard orally. As above observed, testimony in these investigations is often taken without the presence of any member of the Commission. It almost never happens that a majority of the Commission hear the testimony. The only opportunity which a party has of stating his views to this body by word of mouth is upon the argument. The importance of these arguments is recognized, and they will ordinarily be allowed as a matter of course. Application for such argument should, however, be made when the testimony is concluded and not deferred as in this case, although here, even, as soon as we learned that the parties desired to present their views orally the proceeding was reopened and set down for argument." "

§ 266. **Estoppel by Former Order of the Commission.**—

While the technical plea of *res adjudicata* does not apply to proceedings before the Commission, and the rule of *stare decisis* has been held inapplicable to its reports, that body must, of necessity, when it reaches a conclusion on a particular state of facts adhere to that conclusion unless and until the conditions upon which the conclusion was based have changed or unless the Commission acted in the first instance upon a misconception of fact or a mistake of law."

Where, however, the Commission prior to the Hepburn Act, effective August 28, 1906, had declared a rate unreason-

76. *Ullman v. Adams Exp. Co.*, 14 I. C. C. 585, 586.

77. *Banner Milling Co. v. New York C. & H. R. R. Co.*, 14 I. C. C. 398, followed in *Kansas City Traffic Bureau v. Atchison, T. & S. F. Ry. Co.*, 15 I. C. C. 491, 497; *Receivers & Shippers Assn. v. Cincinnati, N. O. & T. P. Ry. Co.*, 18 I. C. C. 440; *Waco*

*Freight Bureau v. Houston & T. C. T. Co.*, 19 I. C. C. 22, 24; *Hillsdale Coal & Coke Co. v. Pennsylvania R. Co.*, 19 I. C. C. 356, 361. *Traugott, Schmidt & Sons v. M. C. R. R. Co.*, 23 I. C. C. 684; *Hires Condensed Milk Co. v. P. R. Co.*, 33 I. C. C. 441, 445; *Traffic Bureau of Nashville v. L. & N. R. R. Co.*, 43 I. C. C. 366, 367, and cases cited.

able, and its order had not been enforced by the courts, the Commission was not prevented after the passage of that Amendment from again considering the question."

The statute requires that the orders of the Commission shall continue in force two years, after which time the Commission has power again to consider the question and enter another and, if the facts justify, a different order."

#### § 267. Rules of Procedure Prescribed by the Commission.

—By section 17 of the Act it is provided:

"That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. \* \* \* Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney."

Under authority granted under said section, the Interstate Commerce Commission has promulgated rules of practice which are copied in the sections following.

By amendment repeated in the 1920 Act the Commission may divide itself into divisions which hear and decide cases. On rehearings the Commission sit as a whole.

#### § 268. Public Sessions and Hearings.

(a) Public sessions of the Commission or Divisions thereof for hearing evidence or oral arguments or for public conferences, and hearings before examiners, will be held as set upon notice by the Commission subject to change upon such notice as may be practicable. Rule 1.

78. *National Hay Assn. v. Michigan Cent. R. Co.*, 19 I. C. C. 34. For a history of the first case see, *National Hay Assn. v. Lake Shore & M. S. Ry. Co.*, 9 I. C. C. 264; *Int. Com. Com. v. Lake Shore & S. Ry. Co.*, 134 Fed. 942; *Int. Com. Com. v. Lake*

*Shore & M. S. Ry. Co.*, 202 U. S. 613, 50 L. Ed. 1171, 26 Sup. Ct. 865.

79. *Re Advances in Rates between the Mississippi and Missouri Rivers*, *Warnock v. Chicago & N. W. Ry. Co.*, 21 I. C. C. 546.

**§ 269. Parties.**

(a) The parties to proceedings before the Commission are complainants, defendants, interveners, protestants, respondents, applicants, and petitioners, according to the nature of the proceeding and their relation thereto. Any party may appear and be heard in person or by attorney.

(b) In complaint cases, the parties who may complain to the Commission of anything done or omitted to be done in violation of the provisions of the Act to regulate commerce, as amended, otherwise known as the Interstate Commerce Act, and in these rules referred to as the Act, by any common carrier subject to the Act are those designated in section 13 of the Act, and are styled complainants. The common carriers so complained of, and their receivers or operating trustees, if any, are styled defendants. Two or more complainants may join in one complaint if their respective causes of action are against the same defendant or defendants and involve substantially the same violation of the Act and a like state of facts.

(c) If complaint is made in respect of through transportation by continuous carriage or shipment all carriers subject to the Act participating therein should be made defendants.

(d) If complaint is made of rates, fares, charges, regulations or practices of more than one carrier all carriers against which an order is sought should be made defendants.

(e) If complaint is made of a classification or any provision thereof it will ordinarily suffice to make defendants the carriers operating one or more through routes between representative points of origin and destination.

(f) The receiver or operating trustee of the line of a defendant must also be made defendant.

(g) In investigation proceedings the carriers designated therein are styled respondents.

(h) In investigation and suspension proceedings the applicants upon whose protests the proceeding was instituted are styled protestants.

(i) In applications for relief from any provision of the Act the carriers by or on whose behalf the application is made are styled applicants.

(j) Others seeking relief are styled petitioners.

**§ 269A. Interventions.**

(k) Petitioners permitted to intervene as hereinafter provided are styled interveners.

(l) Any one entitled under the Act to complain to the Commission may petition for leave to intervene in any pending proceeding prior to or at the time it is called for hearing, but not after except for good cause shown. The petition shall set forth the grounds of the proposed intervention; the position and interest of the petitioner in the proceeding; and, if affirmative relief is sought, should conform to the requirements for a formal complaint. Leave will not be granted except on allegations reasonably pertinent to the issues already presented and which do not unduly broaden them. If leave is granted, the intervener thereby becomes a party to the proceeding. When the petition is filed prior to the hearing the petitioner must furnish therewith a sufficient number of copies for service upon all parties to the proceeding and three additional copies for the use of the Commission. When not so filed prior to but tendered at the hearing sufficient copies must be provided for distribution as motion papers to the parties represented at the hearing. If leave be granted at the hearing sufficient copies must also be furnished for service and 3 additional copies for the use of the Commission. It is desirable, especially where affirmative relief is sought, that the petition be filed in season to permit of service on the defendants and afford them an opportunity to answer before the hearing, thereby making it possible in some instances to grant leave which otherwise it may be necessary to deny in fairness to the parties to the proceeding. Rule 2.

**§ 270. Complaints.**

(a) Complaints may be either informal or formal.

(b) Informal complaints may be made by letter or other writing and as received are filed. Matters thus presented are, if their nature warrants it, taken up by correspondence with the carriers affected in an endeavor to bring about adjustment or satisfaction of the complaint without formal hearing, and are given serial numbers on the informal doc-

ket. This informal procedure has been found efficacious in the great majority of cases and is recommended.

(c) No form of informal complaint is prescribed, but in substance the letter or other writing must contain the essential elements of a complaint, including name and address of the complainant, a statement that the Act has been violated by the carrier or carriers named, indicating when, where and how, and a request for affirmative relief. It is desirable that the informal complaint be accompanied by copies in sufficient number to enable the Commission to transmit one to each carrier named, and it may be accompanied by supporting papers. Proceedings thus instituted on the informal docket are without prejudice to complainant's right to file and prosecute formal complaint, whereupon the proceedings on the informal docket will be discontinued.

(d) Sec. 16 of the Act, as amended by sec. 424 of the Transportation Act, 1920, provides that all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, unless the carrier, after the expiration of such two years or within ninety days before such expiration, begins an action for recovery of charges in respect of the same service, in which case such period of two years shall be extended to and including ninety days from the time such action by the carrier is begun. In either case the cause of action in respect of a shipment of property shall, for the purposes of said Sec. 16, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after. Sec. 206, subdivision (f), of the Transportation Act, 1920, provides that the period of Federal control shall not be computed as a part of the period of limitation in claims for reparation to the Commission for causes of action arising prior to Federal control. The period of time within which complaints for recovery of damages shall be filed with the Commission under these statutory provisions, and those cited in Appendix 1, will be referred to in these Rules as the statutory period.

(e) A complaint for the recovery of damages may be informal but must be filed within the statutory period, and,

if informal, should contain, in addition to the matters above indicated, such data as will serve to identify with reasonable definiteness the shipments or other transportation services in respect of which recovery is sought, the carriers participating, the kind and amount of injury sustained when and by whom, and, if any recovery is sought on behalf of others than complainant, a statement of the capacity or authority in or by which complaint is made in their behalf. Notification to the Commission that a complaint may or will be filed later for the recovery of damages is not a filing of complaint within the meaning of the statute.

Illustrative of pertinent data are, in case of shipments, their dates, origins, destinations, consignors and consignees, dates of delivery or tender of delivery, car numbers and initials if in carloads, routes of movement, if known, commodities transported, weight, charges assessed, at what rate, when and by whom paid and by whom borne.

(f) Carriers willing to pay damages for violations of the Act should make application in the form prescribed by the Commission for authority to pay. Such applications will be filed in the special docket under serial number, and, if granted, orders to that effect will be entered on the special docket. Such application, when not made upon informal complaint filed with the Commission, must be filed within the statutory period and will be deemed the equivalent of an informal complaint and an answer thereto admitting the matters stated in the application. If a carrier is unable to file such application within the statutory period and the claim is not already protected from the operation of the statute by informal complaint, a statement setting forth the facts may be filed by the carrier within the statutory period. Such statement will be deemed the equivalent of an informal complaint filed on behalf of the shipper and sufficient to stay the operation of the statute.

(g) If it develops that the complaint for recovery of damages cannot be disposed of informally, the complainant and the carriers affected will be so notified in writing by the Commission. In such case formal complaint must be filed with the Commission within 6 months after the date on which such notification is mailed to complainant, and, if so filed, will be deemed to relate back

to the date of filing the informal complaint. If formal complaint is not so filed within 6 months after the date of mailing such notification the complainant will be deemed to have abandoned the complaint and no formal complaint for recovery of damages based on the same cause of action will thereafter be placed on file or considered unless itself within the statutory period.

(h) Formal complaints must conform to the requirements of rule XXI. The names of all parties complainant and defendant must be stated in full without abbreviation, and the address of each complainant, with the name and address of his attorney, if any, must appear. Each formal complaint must be accompanied by copies in sufficient number to enable the Commission to serve one upon each party defendant and retain three for its own use. The Commission will serve the complaint upon each defendant by leaving a copy with its designated agent in Washington, D. C., or, if no such agent has been designated, by posting a copy in the office of the Secretary of the Commission.

(i) Complaints should be so drawn as fully and completely to advise the parties defendant and the Commission wherein the provisions of the Act have been, are, (or) (and) will be violated, by a continuance of the acts or omissions complained of, and should set forth briefly and in plain language the facts claimed to constitute such violation and the relief sought. Two or more grounds of complaint involving the same principle, subject, or state of facts, may be included in one complaint, but should be separately stated and numbered. The several rates, fares, charges, classifications, regulations, or practices complained of should be set out by specific reference to the tariffs in which they appear whenever that is practicable.

(j) In case violation of two or more sections of the Act is alleged the facts claimed to constitute violation of one section should be stated separately from those in respect of any other section or sections, wherever that can be done by reference or otherwise without undue repetition.

(k) In case violation of section 1 of the Act is alleged, the complaint should show whether the rates, fares or charges assailed have been increased since January 1, 1910.

(l) In case unjust discrimination in violation of section 2 is alleged the special rate, rebate, drawback or other device and the manner in which thereby the greater or less compensation complained of has been charged, collected or received should be specified.

(m) In case undue or unreasonable preference or advantage, or undue or unreasonable prejudice or disadvantage, in violation of section 3 alleged, the particular person, company, firm, corporation, locality or description of traffic affected thereby, and the particular preference or advantage, or prejudice or disadvantage, relied upon as constituting such violation, should be clearly specified.

(n) If the complaint brings in issue any rate, fare, charge, classification, regulation or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, as causing any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared unlawful under Sec. 13 of the Act, as amended by Sec. 416 of the Transportation Act, 1920 the complaint should also contain appropriate allegations to present for decision the issue of the justness and reasonableness under section 1 of the rates, fares, charges, classifications, regulations or practices complained of in so far as applicable to interstate or foreign commerce, and the issue as to what should be the rate, fare or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation or practice thereafter to be observed in order to remove such advantage, preference, prejudice or discrimination. The facts should be stated with sufficient definiteness to disclose fully the contention made in respect of any tariff provision prescribed, established or compelled by State authority or by the President. The Commission, before proceeding to hear and dispose of such issue, must cause the State or States interested to be notified of the proceeding and must be furnished with copies of the complaint in sufficient number for that purpose.

(o) In case violation of section 4 of the Act is alleged the facts as to compensation charged or received, the respects in which the section was thereby violated, and the tariff provisions applicable, should be stated with particularity.

(p) In case recovery of damages is sought the complaint should contain appropriate allegations showing, in addition to the matters indicated above, such data as will serve to identify with reasonable definiteness the shipments or other transportation services in respect of which recovery is sought, and stating (a) that complainant makes claim for reparation, (b) the name of each individual claimant asking reparation, (c) the names of defendants against which claim is made, (d) the commodities transported, the rate applied, the date when the transportation charges were paid, by whom paid, and by whom borne, (e) the period of time within which or the specific dates upon which the shipments were made, and the dates when they were delivered or tendered for delivery, (f) the points of origin and destination, either specifically, or, where they are numerous, by definite indication of a defined territorial or rate group of the points of origin and destination, and, if known, the routes of movement, (g) the nature and amount of the injury sustained by each claimant, and (h) if any reparation is sought on behalf of others than the complainant, in what capacity or by what authority complaint is made in their behalf.

(q) The Commission will consider as in substantial compliance with the statute of limitations a complaint in which the complainant alleges that the matters complained of, if continued in the future, will constitute violations of the Act in the particulars and to the extent indicated, and prays reparation to the Commission for causes of action arising prior which may move during the pendency of the proceeding and on which the transportation charges shall be paid and borne by the complainant.

(r) If a general rate adjustment is challenged in the complaint, or many shipments or points of origin and destination are involved, it is the practice of the Commission to find and determine in its report the issues as to violation of the Act, injury thereby to complainant, and right to reparation, and thereafter to afford the parties opportunity to agree or

make proof respecting the shipments and amount of reparation due under its finding before entering its order awarding reparation. See Rule V. In such cases freight bills and other exhibits bearing on the details of shipments, and the amount of reparation on each, need not be produced at the hearing unless called for or needed to develop other pertinent facts.

(s) Except under unusual circumstances, and for good cause shown, reparation will not be awarded upon a complaint in which it is not specifically prayed for, or upon a new complaint by or for the same complainant which is based upon any finding in the original proceeding.

(t) Supplemental complaints may be tendered for filing by the parties complainant against the parties defendant in the original complaint, setting forth any causes of action under the Act alleged to have accrued in favor of the complainants and against the defendants since the filing of the original complaint, and, upon leave granted, will be filed and served by the Commission as provided in cases of original complaints, and heard, considered and disposed of therewith in the same proceeding, if practicable.

(u) If recovery of damages is sought by supplemental complaint it must be filed with the Commission within the statutory period.

(v) Cross complaints. See Rule IV. Rule 3.

§ 271. **Answers.**

(a) Answers must conform to the requirements of Rule **XXI.**

(b) Answers to formal complaints must be filed with the Commission within 20 days after the day on which the complaint was served. For defendants having general offices at or west of El Paso, Tex., Salt Lake City, Utah, or Spokane, Wash., said period of 20 days is extended to 30 days. The periods so fixed may be shortened or extended by the Commission when it deems advisable. The answer must in the same period be served as provided in Rule VI. Any defendant failing to file and serve answer within said period will be deemed in default and issue as to such defendant will be thereby joined.

(c) Answers to petitions in intervention or amended complaints filed and served upon leave granted need not be

separately made unless the defendants so elect, and their answers to the formal complaint will be deemed answers to the petition in intervention. Answers if separately made should be filed and served as promptly as possible, and within the same period after service of petition in intervention as is above provided for answers after service of complaints. Answers to cross-complaints filed and served upon leave granted must be filed and served within the same period after service of the cross-complaint.

(d) All answers should be so drawn as fully and completely to advise the parties and the Commission of the nature of the defense, and should admit or deny specifically and in detail each material allegation of the pleading answered.

(e) An answer denying that an alleged discrimination is unjust under section 2 of the Act, or that an alleged preference or prejudice is undue or unreasonable under section 3 of the Act, should state fully the grounds relied upon in making such denial.

(f) Whenever it is apparent from the pleading answered, either by direct allegation or otherwise, that a departure from the requirements of the fourth section of the Act, is involved, the answer should set forth by number the particular application or order, if any, which protects such departure.

(g) It is desired that every effort be made to narrow the issues upon hearing. Matters alleged as affirmative defenses should be separately stated and numbered. Counterclaims and set-offs against shippers are not within the jurisdiction of the Commission.

(h) Cross-complaints alleging violations of the Act by carriers complainant or seeking relief against them thereunder may be tendered for filing by defendants with their answers, and, upon leave granted, will be filed and served by the Commission in the manner provided in Rule III for complaints. In such cases the cross-complaint will be heard, considered and disposed of in connection with the issues raised by the complaint in the same proceeding.

(i) If a defendant satisfies a formal complaint, either before or after answering, a statement to that effect signed by

both complainant and defendant must be filed setting forth when and how the complaint has been satisfied. Rule 4.

**§ 272. Reparation Statements—Formal Claims For Reparation Based Upon Findings of the Commission.**

(a) When the Commission finds that reparation is due, but that the amount cannot be ascertained upon the record before it, the complainant should immediately prepare a statement showing details of the shipments on which reparation is claimed in accordance with Form 5. (See page 38). The statement should not include any shipment not covered by the Commission's findings, or any shipment on which complaint was not filed with the Commission within the statutory period. See Rule III. The statement, together with the paid freight bills on the shipments, or true copies thereof, should then be forwarded to the carrier which collected the charges for checking and certification as to its accuracy. The certificate must be signed in ink by a general accounting officer of the carrier and should cover all of the information shown in the statement. If the carrier which collected the charges is not a defendant in the case its certificate must be concurred in by like signature on behalf of a carrier defendant.

(b) If the shipments moved over more than one route a separate statement should be prepared for each route, and separately numbered, except that shipments as to which the collecting carrier is in each instance the same may be listed in a single statement if grouped according to routes.

(c) Statements so prepared and certified shall be filed with the Commission, whereupon it will consider entry of an order for reparation. The filing of statements will not stop the running of the statute of limitations as to shipments not covered by complaint or supplemental complaint. See Rule III.

(d) All discrepancies, duplications, or other errors in the statements should be adjusted by the parties and correct agreed statements submitted to the Commission. Rule 5.

**§ 273. Service of Papers.**

(a) Formal complaints and, upon leave granted, petitions in intervention, supplemental complaints, cross-complaints,

and amended complaints, will be served by the Commission, and copies of each must be furnished in sufficient number, as provided in Rule III in respect of complaints.

(b) Answers, petitions, motions, applications, notices and all other papers, except depositions, in proceedings pending before the Commission upon its formal docket, must, when filed or tendered for filing by the Commission show service thereof upon all parties to the proceeding. Such service shall be made by delivering in person or by mailing, properly addressed with postage prepaid, one copy to each party.

(c) When any party has appeared by attorney service upon such attorney will be deemed service upon the party. Rule 6.

§ 274. **Amendments to Pleadings.**—Amendments to any pleading will be allowed or refused by the Commission at its discretion. Rule 7.

§ 275. **Continuances.**—Continuances and extensions of time will be granted or denied by the Commission at its discretion. Rule 8.

§ 276. **Stipulations Desirable and Must be in Writing.**—The parties may, by stipulation in writing filed with the Commission, or presented at the hearing, agree upon any facts involved in the proceeding. It is desired that the facts be thus agreed upon in so far as and whenever practicable. Rule 9.

§ 277. **Hearings.**

(a) When issue is joined upon formal complaint by service of answer, or by failure of defendant to answer, the Commission will assign a time and place for hearing. Witnesses will be examined orally before the Commission, a commissioner, or one of its examiners, unless their testimony is taken by deposition or the facts are agreed upon as provided for in these rules.

(b) At hearings on formal complaint the complainant shall open and close. At hearings upon applications for relief from any provision of the Act the applicant shall open and close. At hearings of investigation and suspension proceedings the respondent shall open and close. At hearings of all other investigations on the motion of the Commission, the

Commission shall open and close, except as the Commission may prescribe a different order or the presiding commissioner or examiner may otherwise direct. In hearings of several proceedings upon a consolidated record the presiding commissioner or examiner shall designate who shall open and close. Interveners shall follow the party in whose behalf the intervention is made, and in all cases where the intervention is not in support of either original party the presiding commissioner or examiner shall designate at what stage such interveners shall be heard. Rule 10.

**§ 278. Depositions, How Taken.**

(a) The deposition of a witness for use in a proceeding pending before the Commission may, after issue joined, be taken in compliance with the following rules of procedure, prescribed under section 17 of the Act, but not otherwise.

(b) Such depositions may be taken before a special agent or examiner of the Commission, or any judge or commissioner of any court of the United States, or any clerk of a district court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public not being of counsel or attorney to either of the parties nor interested in the event of the proceeding or investigation, according to such designation as the Commission may make in any order made by it in the premises, except that where such deposition is taken in a foreign country it may be taken before an officer or person designated by the Commission or agreed upon by the parties by stipulation in writing to be filed with the Commission.

Any party desiring to take the deposition of a witness in such a proceeding shall notify the Commission to that effect, and in such notice shall state the time when, the place where, and the name and post-office address of the party before whom it is desired that the deposition be taken, the name and post-office address of the witness and the subject matter or matters concerning which the witness is expected to testify, whereupon the Commission will make and serve upon the parties or their attorneys an order wherein the Commission

shall name the witness whose deposition is to be taken, and specify the time when, the place where, and the party before whom the witness is to testify, but such time and place, and the party before whom the deposition is to be taken, so specified in the Commission's order, may or may not be the same as those named in said notice to the Commission.

(c) Every person whose deposition is so taken shall be cautioned and sworn (or affirmed, if he so request) to testify the whole truth and nothing but the truth concerning the matter about which he shall testify, and shall be carefully examined. His testimony shall be reduced to typewriting by the officer before whom the deposition is taken, or under his direction, after which the deposition shall be subscribed by the witness and certified in usual form by the officer. After the deposition has been so subscribed and certified it shall, together with two copies thereof made by such officer or under his direction, be forwarded by such officer under seal in an envelope addressed to the Commission at its office in Washington, D. C. Upon receipt of the deposition and copies the Commission will file in the record in said proceeding such deposition and forward one copy to the complainant or his attorney and the other copy to the defendant or its attorney, except that where there are more than one complainant or defendant the copies will be forwarded by the Commission to the parties designated by such complainants or defendants as the case may be.

(d) Such depositions must conform to the specifications of Rule XXI.

(e) No deposition shall be taken except after 6 days' notice to the parties, and where the deposition is taken in a foreign country such notice shall be at least 15 days.

(f) No such deposition shall be taken either before the proceeding is at issue, or, unless under special circumstances and for good cause shown, within 10 days prior to the date of the hearing thereof assigned by the Commission, and where the deposition is taken in a foreign country it shall not be taken after 30 days prior to such date of hearing.

(g) Witnesses whose depositions are taken pursuant to these rules and the magistrate or other officer taking the same, unless he be a special agent or examiner of the Com-

mission, shall severally be entitled to the same fees as are paid for like service in the courts of the United States, which fees shall be paid by the party or parties at whose instance the depositions are taken. Rule 11.

**§ 279. Witnesses and Subpœnas.**

(a) Subpœnas requiring the attendance of witnesses from any place in the United States at any designated place of hearing may be issued by any member of the Commission.

(b) Subpœnas for the production of books, papers, or documents, unless directed by the Commission upon its own motion, will issue only upon application in writing. Applications to compel witnesses who are not parties to the proceedings, or agents of such parties, to produce documentary evidence must be verified and must specify, as nearly as may be, the books, papers, or documents desired and the facts to be proved by them. Applications to compel a party to the proceeding to produce books, papers, or documents should set forth the books, papers, or documents sought, with a showing that they will be of service in the determination of the proceeding.

(c) Witnesses who are summoned are entitled to the same fees as are paid for like service in the courts of the United States, such fees to be paid by the party at whose instance the testimony is taken. Rule 12.

**§ 280. Documentary Evidence.**

(a) Where relevant and material matter offered in evidence by any party is embraced in a book, paper or document containing other matter, not material or relevant, the party must plainly designate the matter so offered. If the other matter is in such volume as would unnecessarily cumber the record, such book, paper or document will not be received in evidence but may be marked for identification and, if properly authenticated, the relevant and material matter may be read into the record, or, if the presiding commissioner or examiner so directs, a true copy of such matter, in proper form, shall be received as an exhibit, and like copies delivered by the party offering the same to opposing parties or their attorneys appearing at the hearing, who shall be afforded opportunity to examine the book, paper or document, and to offer in

evidence in like manner other portions thereof if found to be material and relevant.

(b) In case any portion of a tariff, report, circular, or other document on file with the Commission is offered in evidence, the party offering the same must give specific reference to the items or pages and lines thereof to be considered. The Commission will take notice of items in tariffs and annual or other periodical reports of carriers properly on file with it or in annual, statistical, and other official reports of the Commission. When it is desired to direct the Commission's attention to such tariffs or reports upon hearing or in briefs or argument it must be done with the precision specified in the second preceding sentence. In case any testimony in proceedings other than the one on hearing is offered in evidence, a copy of such testimony must be presented as an exhibit. When exhibits of a documentary character are to be offered in evidence, copies must be furnished to opposing counsel.

(c) All exhibits showing rates or distances must, by proper I. C. C. number reference, indicate the tariff authority for the rates, and must also show by lines and junction joints the routes via which the distances are computed, as well as the authority for the distances used.

(d) All exhibits received in evidence are bound with the rest of the record in covers of uniform size. It thus becomes desirable that, wherever practicable, they should be on one side only of sheets not exceeding 12½ inches from top to bottom by 22 inches in width, and imperative that a sufficient margin for binding, preferably 1½ inches, be left blank on the left side of each sheet. They must be on paper of good quality and so prepared as to be plainly legible and durable, whether printed, typewritten, mimeographed, planographed, photographed or otherwise. The use of hectograph and white-line blue prints is discouraged.

(e) The sheets of each exhibit and the lines of each sheet should be numbered, wherever practicable. The first sheet, or title page should be confined to a brief statement of what the exhibit purports to show, with reference by sheet and line to illustrative or typical examples contained in the ex-

hibit. It is desirable that, wherever practicable, rate comparisons and other evidence should be condensed into tables.

(f) Where agreed upon by the parties at or after the hearing, the presiding commissioner or examiner, if he deems advisable, may receive specified documentary evidence as a part of the record within a time to be fixed by him, but which shall expire not less than 10 days before the date fixed for filing and serving briefs.

(g) Except as above provided, or as may be expressly permitted in particular instances, the Commission will not receive in evidence or consider as part of the record any documents, letters or other writings submitted for consideration in connection with the proceeding after the close of the testimony, and will return the same to the sender. Rule 13.

#### § 281. Briefs and Oral Argument.

(a) Briefs must be printed and comply with the requirements of Rule XXI. The date of each brief must appear on its front cover or title page. Each brief should contain an abstract of the evidence relied upon by the party filing it, preferably assembled by subjects, with reference to the pages of the record or exhibit where the evidence appears. It should include requests for such specific findings as the party thinks the Commission should make.

(b) Exhibits should not be reproduced in the brief, but may, if desired, be reproduced in an appendix to the brief. Analyses of such exhibits should be included in the abstract of evidence under the subjects to which they pertain. The abstract of evidence should follow the statement of the case and precede the argument. Every brief of more than 20 pages shall contain on its front fly-leaves a subject index with page references, the subject index to be supplemented by a list of all cases cited, alphabetically arranged, with references to the pages where the citations appear. In proceedings upon complaint alleging undue prejudice to or preference of any locality as contrasted with another locality, or otherwise attacking a rate relationship, the complainant should insert in his brief opposite the statement of the case a small map or chart of the territory showing the situation involved.

(c) Briefs not filed with the Commission and served on or before the dates fixed therefor will not be received except by special permission of the Commission. All briefs must be accompanied by notice, showing service upon all other parties or their attorneys who appeared at the hearing or on brief, and 20 copies of each brief shall be furnished for the use of the Commission. Applications for extension of time in which to file briefs shall be by petition, in writing, stating the facts on which the application rests, which must be filed with the Commission at least five days before the time fixed for filing such briefs.

(d) Except as hereinafter provided in subdivision (e) of this rule, briefs for the various parties shall be filed in the same order as governs in the taking of their testimony at hearings. At the close of the testimony in each case the presiding commissioner or examiner will fix the time for filing and service of the respective briefs as follows, unless good cause for variation therefrom is shown: For the opening brief, 30 days from close of testimony; for the brief of the opposing party, 15 days after the date fixed for the opening brief; for reply brief, 10 days after the date fixed for the brief of the opposing party. Briefs of interveners shall be filed and served within the time fixed for the brief of the party in whose behalf the intervention is made, or within such other time as may be fixed by the presiding commissioner or examiner. Parties who fail to file opening brief, as required by this rule, will not be permitted to file reply to brief of opposing party. Except as provided in subdivision (e) of this Rule applications for oral argument before the Commission or a Division thereof shall be made at the hearing or in writing within 10 days after the close of testimony.

(e) For application in cases designated in the notices setting them for hearing as "proposed report" cases, the following procedure will govern, superseding that prescribed elsewhere in these Rules in so far as conflicting therewith:

I. If oral argument before the presiding commissioner or examiner is desired he should be so notified at or before the hearing and may arrange to hear the argument at the close of the testimony within such limits of time as he may determine, having regard to other assignments for hearing before him.

Such argument will be transcribed and bound with the transcript of testimony and will be available to the Commission for consideration in deciding the case. The making of such argument shall not preclude oral argument before the Commission, or a Division thereof, and application therefor may be made as hereinafter provided.

2. Only one initial brief shall be filed by each party. The presiding commissioner or examiner shall fix for all parties the same time within which to file their briefs. Reply briefs are not permitted at this stage.

3. After expiration of the time set for briefs the presiding or participating examiner will prepare his proposed report containing the statement of the issues and facts and the findings and conclusions which he thinks should be made. This proposed report will be served by mailing copies to the parties or attorneys who appeared at the hearing or upon brief, except that in general investigations copies may also be mailed in the Commission's discretion to other parties whose appearances are noted of record.

4. Within 20 days after service of the proposed report any party may file and serve, in the manner prescribed for briefs, exceptions to the examiner's proposed report and brief in support of the exceptions. Exceptions and brief should be contained in one print. Within 10 days after expiration of the time so fixed briefs in reply to the exception briefs may be filed and served, but will not be received later except under leave granted upon application therefor. Applications for oral argument before the Commission or a Division thereof if made by a party filing exceptions must accompany the exceptions, or if made by a party not filing exceptions must be filed not later than 10 days after the time fixed for filing and service of exceptions.

Parties or attorneys at El Paso, Tex., Salt Lake City, Utah, Spokane, Wash., or points west thereof, who appeared at the hearing or upon brief, will be allowed 5 days' additional time for filing and serving exceptions, exception briefs and reply briefs, respectively.

5. Exceptions to the examiner's proposed report either as to statements of fact or matters of law should be specific. If exception is taken to matters of law or conclusions the points relied upon should be stated separately and clearly. If exception is taken to any statement of fact reference should be made to the pages or parts of the record relied upon and a corrected statement incorporated in the exception brief.

6. In the absence of exceptions that are sustained or of ascertained error the statement of the issues and of the facts by the examiner will ordinarily be taken by the Commission as the basis of its report. Rule 14.

**§ 282. Rehearings.**

(a) Applications for further hearing in a proceeding before final submission, for reopening a proceeding after final submission, or for rehearing or reargument after decision, must be made by petition, stating specifically the grounds relied upon, filed with the Commission and served by the petitioner upon all parties or attorneys who appeared at the hearing, or oral argument if had, or on brief.

(b) If the application be for further hearing before final submission, or for reopening the proceeding to take further evidence, the nature and purpose of the evidence to be adduced must be briefly stated and must appear not to be merely cumulative.

(c) If the application be for rehearing or reargument, the matters claimed to have been erroneously decided must be specified and the alleged errors briefly stated. If thereby any order of the Commission is sought to be vacated, reversed or modified by reason of matters which have arisen since the hearing, or of consequences which would result from compliance therewith, the matters relied upon by the petitioner must be fully set forth in the petition.

(d) Applications for modification of orders which seek only change in the date when they shall take effect or in the period of notice thereby prescribed must be made by petition seasonably filed and served in like manner as other applications under this rule, except that, in case of unforeseen emergency satisfactorily shown by the applicant, such relief may be sought informally, by telegram or otherwise, upon notice thereof to all parties or attorneys who appeared as aforesaid.

(e) A petition for rehearing that part of any case relating to reparation must be filed within 60 days after service of the finding or order therein.

(f) Each petition filed under this rule shall be accompanied by 15 copies thereof for the use of the Commission, and by notice showing service upon the parties or attorneys who appeared as aforesaid. Within 10 days after such service any adverse party may file and serve in like manner a reply to the petition, the reply so filed to be accompanied by like number of copies for use by the Commission. Rule 15.

**§ 283. Free Copies of Transcript of Testimony, When Furnished.**

(a) One copy of the transcript of testimony will be furnished by the Commission without charge for the use of the complainant and one copy for the use of the defendant. If two or more complainants or defendants have appeared at the hearing, such complainants or defendants must designate to whom the copy for their use shall be delivered. A similar course will be pursued in proceedings involving the suspension of tariffs.

(b) In proceedings instituted by the Commission on its own motion, other than proceedings involving the suspension of tariffs, no copies of the transcript will be furnished by the Commission. Rule 16.

**§ 284. Orders Must Be Complied With And Notice Given To The Secretary Of The Commission.**

(a) When an order has been issued the defendants or respondents named therein must promptly notify the Commission on or before the date upon which such order becomes effective whether or not compliance has been made therewith. If a change in rates is required the notification must be given in addition to the filing of proper tariffs, and must specify the I. C. C. numbers of the tariffs so filed. Rule 17.

**§ 285. Fourth Section Applications.**

(a) Any common carrier subject to the Act may apply to the Commission, under the proviso clause of the fourth section, for such authorization as it is empowered to grant thereunder. Such application must conform to Rule XXI. The application should specify the places and traffic involved, the rates, fares, or charges on such traffic for the shorter and longer distances, the carriers other than the applicant which may be interested in the traffic, the special nature of the case, the character of the hardship claimed to exist, and the extent of the relief sought by the applicant. Upon the filing of such application the Commission will take such action as the circumstances of the case require. Rule 18.

**§ 286. Suspension Of Rate Increases, How Obtained.**

(a) Suspensions of tariff schedules under section 15 of the Act will not ordinarily be considered unless protest and

application therefor is made in writing or by telegram at least 10 days before the effective date named in the schedule. Applications for suspensions must indicate the schedule affected by its I. C. C. number and give specific reference to the items against which protest is made, together with a statement of the grounds thereof. If such application is made by telegram it must be confirmed and followed by application in writing and should succinctly state the substance of the matters to be set forth in the written application. Seven copies of each written application should be furnished to the Commission. Rule 19.

**§ 287. Secretary To Give Information To Parties.**

(a) The secretary of the Commission will, upon request, advise as to the form of complaint, answer, or other paper to be filed in any proceeding. Rule 20.

**§ 288A. Specifications as to Complaints, Answers, Petitions, Applications, Briefs, Etc.**

(a) All formal complaints, answers, motions, petitions, applications, notices, depositions, or other papers to be filed, must be typewritten or printed.

(b) If typewritten they must be on paper not more than 8½ inches wide or 12 inches long, weighing not less than 16 pounds to the ream, folio base 17 by 22 inches, with left-hand margin not less than 1½ inches wide. The impression must be on only one side of the paper.

(c) If printed they, as well as briefs, must be in 10 or 12 point type, on good unglazed paper, 5-7/8 inches wide by 9 inches long, with inside margin not less than 1 inch wide, and with double-ledged text and single-ledged citations.

(d) Complaints, answers, motions, petitions, applications and notices must be signed in ink by the party, petitioner or applicant, or by his or its duly authorized attorney, and must show the office and post office address of the signer. Rule 21.

**§ 288B. Office and Address of the Commission.**

(a) Pleadings and other papers required to be filed with the Commission may be transmitted by mail or express, or otherwise delivered, but must be received for filing at its office in Washington, D. C., within the time limit, if any, for such

filing. That office is open from 9 a. m. to 4:30 p. m. of each business day.

(b) All communications to the Commission must be addressed to Washington, D. C., unless otherwise specifically directed. Rule 22.

### § 289. Form of Complaint.

Note.—These forms may be used in cases to which they are applicable, with such alterations as the circumstances may render necessary.

#### BEFORE THE INTERSTATE COMMERCE COMMISSION.

..... }  
v. }  
The ..... Railroad Company }  
..... Railway Company. }  
(Insert corporate title, without  
abbreviation of carrier, or car-  
riers, necessary or proper de-  
fendants.)

The complaint of the above-named complainant, respectfully shows:

I. That *(complainant should here state nature and place of business, also whether a corporation, firm, or partnership, and if a firm or partnership, the individual names of the parties composing the same.)*

II. That the defendant above named is a (are) common carrier engaged in the transportation of (passengers and) property, wholly by railroad (or, partly by railroad and partly by water), between points in the state of ..... and points in the state of ....., and as such common carrier is (are) subject to the provisions of the act to regulate commerce approved February 4, 1887, and acts amendatory thereof or supplemental thereto.

III. That *(state in this and subsequent paragraphs to be numbered IV, V, etc., the matter or matters intended to be complained of, naming every rate, fare, charge, classification, regulation, or practice the lawfulness of which is challenged, and also each point of origin and point of destination between which the rates, etc., complained of are applied. Whenever practical tariff references should be given.)*

*(Where discrimination is charged, the facts constituting the*

*basis of the charge should be clearly stated; that is, if the discrimination be under section 2, the person or persons claimed to be favored and the person or persons claimed to be injured should be named, and the kind of service and kind of traffic, together with the claimed similarity of circumstances and conditions of transportation, should be set forth. If the discrimination be under section 3, the particular person, company, firm, corporation, locality, or traffic claimed to be accorded undue or unreasonable preference or advantage, or subjected to undue or unreasonable prejudice or disadvantage, should be stated. If the discrimination be under section 4, the particular provision of the section claimed to be violated—that is, whether the long-and-short-haul provision or the aggregate of intermediate rates provision—as well as the facts constituting such violation should be stated.)*

X. That by reason of the facts stated in the foregoing paragraphs complainant has (have) been subjected to the payment of rates (fares or charges, etc.) for transportation which were when exacted, and still are, (1) unjust and unreasonable in violation of section 1 of the act to regulate commerce, and (or) (2) unjustly discriminatory in violation of section 2, and (or) (3) unduly preferential or prejudicial in violation of section 3, and (or) (4) in violation of the long-and-short-haul (or, aggregate of intermediate rates) provision of section 4 thereof. (Use one or more of the allegations numbered 1, 2, 3, 4, according to the facts as intended to be charged.) That complainant has (have) been injured thereby to his (its, their) damage in the sum of ..... dollars.

Wherefore complainant pray that defendant may be (severally) required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendant (and each of them) to cease and desist from the aforesaid violations of said act to regulate commerce, and establishment of ..... between the origin and destination points named in paragraph ..... hereof, in lieu of the rates (fares, or charges, etc.), named in said paragraph, such other rates (fares, or charges, etc.) as the Commission may deem reasonable to establish and put in force and apply in future to the transportation and just (and also pay to complainant by way of reparation for the unlawful charges hereinbefore alleged the sum of .....,

or such other sum as, in view of the evidence to be adduced herein, the Commission shall determine that complainant is (are) entitled to as an award of damages under the provisions of said act for violation thereof), and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at . . . . ., 19...

.....  
(Complainant's signature)

Form No. 1.

§ 290. **Form of Answer.**

BEFORE THE INTERSTATE COMMERCE COMMISSION.

..... }  
v. }  
The ..... Railroad Company }  
Docket No. ....

The above-named defendant, for answer to the complaint in this proceeding, respectfully state:

I. (*Here follow appropriate and responsive admissions, denials, and averments, answering the complaint paragraph by paragraph.*)

Wherefore defendant pray that the complaint in this proceeding be dismissed.

THE ..... RAILROAD COMPANY,

By .....

.....  
(Title of officer.)

Form No. 2.

§ 291. **Intervening Petition.**

BEFORE THE INTERSTATE COMMERCE COMMISSION.

..... }  
v. } Docket No. ....  
..... }

Comes now your petitioner, ....., and respectfully represents that he has an interest in the matters in litigation in the above-entitled proceeding and moves that he may be allowed to intervene in and become a party to said proceeding, and for cause of intervention says:

I. That (*intervener should here state nature and place of business, and whether a corporation, firm, or partnership, etc.*).

II. (*Intervener should here set out specifically its interest in the above-entitled proceeding in accordance with the last paragraph of rule II of the rules of practice.*)

Wherefore said ..... prays leave to intervene and be treated as a party hereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted.

Dated at ....., 19...

.....  
(*Intervener's signature.*)

Form No. 3.

§ 291a. **Petition for Rehearing.**

BEFORE THE INTERSTATE COMMERCE COMMISSION.

..... }  
v. } Docket No. ....  
..... }

Comes now the complainant (*or defendant*) in the above-entitled proceeding and respectfully petitions the Commission to grant a rehearing therein, and in support of said petition respectfully shows:

I. (*Here set out specifically the matters claimed to be erroneously decided, with a brief statement of the alleged errors, in conformity with rule XV of the rules of practice.*)

Wherefore petitioner prays that a rehearing be granted in the above-entitled case and that the Commission enter such further order or orders in the premises as to it may seem reasonable and just.

Dated at ....., 19...

(*Petitioner's signature.*)

Form No. 4.

§ 291C. **Form of Original Complaint Against the Federal Agent.**

BEFORE THE INTERSTATE COMMERCE COMMISSION.

..... ]

The complaint of the above-named complainant., respectfully shows:

I. That (Complainant should here state nature and place of business, also whether a corporation, firm, or partnership, and if a firm or partnership, the individual names of the partners composing the same.)

II. That defendant ....., Federal Agent is an officer of the United States, appointed by the President pursuant to the provisions of section 206(a) of the Transportation Act, 1920, and as such agent is a representative of the federal government against whom should be brought actions at law and suits in equity, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to Federal control could have been brought against such carrier; and that the railroads and systems of transportation over whose lines or routes the rates (fares, charges, classifications, regulations, or practices) complained of herein applied, and which during federal control were operated by the Director General of Railroads, are as follows: (Here specify the carriers whose railroads or systems of transportation were under federal control and over which the rates, fares, charges, classifications, regulations or practices applied unless complainant elects to name the corporations or companies as defendants.)

III. That (state in this and subsequent paragraphs to be numbered IV, V, etc., the matter or matters intended to be complained of, naming every rate, fare, charge, classification, regulation, or practice the lawfulness of which is challenged, and also each point of origin and point of destination between which the rates complained of are applied. Whenever practical tariff references should be given.)

(Where unjust discrimination or undue prejudice is charged, the facts constituting the basis of the charge should be clearly stated; that is, if the discrimination be under section 2, the person or persons claimed to be favored and the person or persons claimed to be injured should be named, and the kind of service and kind of traffic, together with the claimed similarity of circumstances and conditions of transportation, should be set forth. If the discrimination or undue prejudice be under sec-

SECTION 291a. FORM OF REPARATION STATEMENT UNDER RULE V

Claim No. .... of Richard Roe under the decision of the Interstate Commerce Commerce Commission in Docket No. ....

DATE OF SHIPMENT	DATE OF DELIVERY OR TENDER OF DELIVERY	DATE CHARGES WERE PAID	CAR INITIALS	CAR NUMBER	ORIGIN	DESTINATION	ROUTE	COMMODITY	WEIGHT	AS CHARGED		SHOULD BE		REPARATION ON BASIS OF THE COMMISSION'S DECISION
										RATE	AMT.	RATE	AMT.	
Oct. 7, 1918	Oct. 20, 1918	Oct. 25, 1918	N. P.	41585	Pittsburgh Pa.	Dallas Texas	Boo. MK&T	Jelly	30,000	\$1.25	\$75.00	\$1.16	\$348.00	\$27.00
Oct. 10, 1918	Oct. 23, 1918	Oct. 23, 1918	I. C.	6769	do	do	do	Glasses	33,000	1.25	412.50	1.16	382.80	29.70
Dec. 10, 1918	Dec. 23, 1918	Dec. 24, 1918	C. & E. I.	60288	do	do	do	do	32,500	1.25	406.25	1.16	377.00	29.25
Mar. 29, 1919	Apr. 13, 1919	Apr. 13, 1919	U. P.	10248	do	do	do	do	31,200	1.25	390.00	1.16	361.92	28.08
											1583.75		1469.72	114.03

The undersigned hereby certifies that this statement has been checked against the records of this company and found correct.

Date: March 30, 1920. X. Y. Z. Ry. Co. Collecting carrier, (1) defendant Richard Roe, Claimant.  
By John Smith, Auditor By John Doe, Attorney

(1) If not a defendant, strike out word "defendant". (2) Concurred in: Address: LaSalle, St.,  
A. B. C. Ry. Co., defendant Chicago, Ill.  
By William Jones, Auditor

(3) For concurring certificate in case Date: March 15, 1920  
collecting carrier is not a defendant.

tion 3, the particular person, company, firm, corporation, locality, or traffic claimed to be accorded undue or unreasonable preference or advantage, or subjected to undue or unreasonable prejudice or disadvantage, should be stated. If the complaint is brought under section 10 of the Federal control act approved March 21, 1918, that fact should be stated and appropriate allegations made.)

X. That by reason of the facts stated in the foregoing paragraphs complaint has (have) been subjected to the payment of rates (fares or charges) for transportation which were when exacted, and still are, and if maintained in the future will be (1) unjust and unreasonable in violation of section 1 of the Interstate Commerce Act and (or) (2) unjustly discriminatory in violation of section 2, and (or) (3) unduly preferential or prejudicial in violation of section 3, and (or) (4) unjust and unreasonable in violation of section 10 of the Federal control act. (Use one or more of the allegations numbered 1, 2, 3, 4, according to the facts as intended to be charged.)

Wherefore complainant prays that defendant may be (severally) required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendant (and each of them) to cease and desist from the aforesaid violations of said Interstate Commerce Act, and (or) said Federal control act, and establish and put in force and apply in future to the transportation of ..... between the origin and destination points named in paragraph .... hereof, in lieu of the rates (fares, chargess classifications, regulations, or practices) named in said paragraph, such other maximum rates (fares, charges, classifications, regulations, or practices) as the Commission may deem reasonable and just (and also pay to complainant by way of reparation for the unlawful charges hereinbefore alleged the sum of .... or such other sum as, in view of the evidence to be adduced herein, the Commission shall determine that complainant is (are) entitled to as an award of damages under the provisions of said act for violation thereof), and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated ....., 19...

.....  
Complainant.

## EXPLANATORY NOTE.

That the conference rulings of the Interstate Commerce Commission are important to shippers and carriers and are not always available, make proper their insertion here. These are copied just as issued by the Commission. The Commission in a preface to the rulings says:

“The rulings of the Commission in conference are announced informally from time to time through the public press and are later edited and issued in this form for the information of shippers, carriers, and others interested in transportation matters. The rulings express the views of the Commission on informal inquiries involving special facts or requiring an interpretation and construction of the law, and are to be regarded as precedents governing similar cases. This bulletin contains all the rulings promulgated by the Commission since it adopted the practice of publishing them, and takes the place of previous bulletins.

It will be observed that in the light of a wider knowledge of the subjects involved some of the rulings have been withdrawn, while others have been modified and restated in later rulings. In such instances the text of the original ruling has been omitted, while the title and number have been retained with annotations directing attention to the development of the principle in the subsequent ruling.

For convenience of reference it is suggested that conference rulings be cited in briefs and correspondence in this form: “*Conf. Ruling* —,” giving the number of the ruling, it being unnecessary to refer also to this bulletin by its number; where the ruling consists of lettered paragraphs, as for example Ruling 220, the particular paragraph may be cited in this form: “*Conf. Ruling 220b.*”

CONFERENCE RULINGS OF THE INTERSTATE COMMISSION.

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*November 4, 1907.*

1. **PASSES TO CARETAKERS.**—An employee of a produce company was granted a pass for the purpose of going to a point on the carrier's lines and returning as caretaker of a carload of bananas. He was not able to secure a return shipment: *Held*, That the carrier must collect the full fare. (See ruling 37.)

2. **TARIFFS DISTINGUISHING BETWEEN SHIPMENTS HANDLED BY STEAM AND ELECTRICAL POWER.**—An amendment to tariff provided: "The above rates will only apply on shipments handled by steam power and will not apply when handled by electrical power": *Held*, That the limitation of the rates to shipments handled by steam power is unlawful and must be eliminated from the tariff. (See ruling 34.)

3. **COLLECTION OF UNDERCHARGES.**—(Restated in ruling 314.)

*November 11, 1907.*

4. **RATES ON NEW LINES.**—Rule 44 of Tariff Circular No. 14-A, providing that rates may be established in the first instance on "new lines" without notice, was intended to apply to newly constructed lines only. (See Rule 57, Tariff Circular 18-A.)

5. **FREE STORAGE CREATING DISTRIBUTING POINT FOR PRIVATE INDUSTRY.**—Its attention being called to a tariff which, in effect, created a distributing point for a special industry by granting it free storage at that point, either in its own or the carrier's warehouses, and practically without limit as to time, the merchandise when shipped out to go on balance of through rate, the Commission expressed its disapproval.

6. **RECONSIGNMENT RULE WILL NOT BE GIVEN RETROACTIVE EFFECT.**—A shipment consigned to one point was reconsigned en route to another, the tariff containing no reconsignment privilege. As a consequence local rates to and

from the reconsigning point were applied and made higher than the through rate: *Held*, Under subsequent tariff that did not reduce rates, but incorporated a reconsignment privilege, that the benefit of such privilege could not be applied retroactively to a previous shipment, and can not be accepted as the basis for a refund on special reparation docket. (Extended in application by rulings 77 and 166. See *Cady Lumber Co. v. M. P. Ry. Co.*, 19 I. C. C., 13; *Henry v. Eastern Ry. Co.*, 20 I. C. C., 172; and *Swift & Co. v. M. & O. R. R. Co.*, 39 I. C. C., 701.)  
*November 18, 1907.*

7. COMMISSIONS ON IMPORT TRAFFIC.—The granting by carriers of commissions to persons acting as consignees on import traffic is a practice that can not be sanctioned. (See rulings 221a, 300, and 444.)

8. DEMURRAGE CHARGES RESULTING FROM STRIKES.—The Commission has no power to relieve carriers from the obligation of tariffs providing for demurrage charges, on the ground that such charges have been occasioned by a strike. (See note to ruling 242, and ruling 358.)

9. FREE TRANSPORTATION BY CARRIERS FOR ONE ANOTHER.—(Restated in ruling 225b.)  
*December 2, 1907.*

10. STATUTE OF LIMITATIONS.—Claims filed with the Commission since August 28, 1907, must have accrued within two years prior to the date when they are filed; otherwise they are barred by the statute. Claims filed on or before August 28, 1907, are not affected by the two years' limitation in the act. (See rulings 220j, 306, and 307; also *Fels & Co. v. P. R. R. Co.*, 23 I. C. C., 487.)

11. REDUCTION OF RATE WHEN FORMAL COMPLAINT AGAINST IT IS PENDING.—(Restated in ruling 14.)

12. TARIFF THAT FAILS TO STATE THE DATE OF ITS EFFECTIVENESS IS UNLAWFUL.—A tariff was filed without naming a date on which it was to take effect. Does it ever become effective; and if so, when? *Held*, That the tariff

was unlawful and has never taken effect. (See rulings 73 and 100*b*.)

**13. TARIFFS NOT CONCURRED IN ARE UNLAWFUL.**

—A properly accredited chairman of a tariff committee published tariffs for certain carriers for which he was the duly constituted attorney in fact for that purpose. A carrier declining to concur in his tariffs put a new cover on them and filed them as its own tariffs without securing the concurrences of the other carriers named therein: *Held*, That the tariffs so adopted were unlawful and could not be used by the carrier.

*January 6, 1908.*

**14. MAINTENANCE OF RATE REDUCED AFTER COMPLAINT FILED.**—On December 2, 1907, it was decided that when a rate is reduced after answer has been made and before hearing, the report disposing of the proceeding shall carry with it an order directing the defendant to maintain that rate as a maximum for not less than two years. On December 6 it was decided that orders in special reparation cases shall include a clause providing that the new rate or regulation upon the basis of which reparation is granted shall be maintained for a period of at least one year.

It is now agreed that the two years so required in orders upon formal complaints and the one year in orders in special reparation cases shall run from the date of the order and not from the date when the reduced rate or new regulation became effective. (See rulings 130, 200-*a*, and 396.)

**15. DELIVERING CARRIER MUST INVESTIGATE BEFORE PAYING CLAIMS.**—(Restated in ruling 462.)

**16. DELIVERING CARRIER MUST COLLECT UNDERCHARGES.**—Even though an undercharge results from an error in billing by the initial carrier or a connection, the delivering carrier must collect the undercharge. The legal expense attending its efforts to collect undercharges in such cases would seem to be a valid claim against the carrier through whose fault the mistake was made. (Reaffirmed by ruling 156; see also ruling 214; also *Western Classification Case*, 25 I. C. C., 475.)

**17. FEEDING AND GRAZING IN TRANSIT.**—(Restated in ruling 442.)

**18. FREE TRANSPORTATION OF DEAD BODY OF EMPLOYEE.**—When an employee of a carrier has been killed or has died in service at a distant point, the carrier may, free of charge and as a general incident to the relation between it and its employees, lawfully transport the body to the home of the deceased for burial. (See Rulings 173 and 193.)

**NOTE.**—The amendatory act of April 13, 1908, expressly sanctions the free transportation of the remains of a person killed in its employ.

**19. EXPENSE INCURRED IN PREPARING CARS FOR SHIPMENTS CAN NOT BE PAID BY CARRIER IN THE ABSENCE OF TARIFF PROVISION THEREFOR.**—Not having box cars available for the movement of machinery, cattle cars were supplied at the request of the shipper, who lined them with tar paper and felt in order to protect his shipments from weather conditions: *Held*, That in the absence of tariff authority the carrier can not lawfully reimburse the shipper for the expense so incurred. (See rulings 78, 132, 267, 292, and 360.)

**20. SPECIAL UNDERSTANDINGS BETWEEN SHIPPERS AND CARRIERS, NOT PUBLISHED IN THEIR TARIFFS, OF NO VALID EFFECT.**—A shipper had an understanding with agents of carriers that when he delivered shipments to them consigned to stations at which there were no agents the carriers would so advise him and hold the shipments for further direction. In a given case a carrier neglected to so advise him and to hold the shipment, but billed it and sent it forward to a nonagency station as a prepaid shipment: *Held*, That the shipper must pay the charges, and that no understanding of that nature, not incorporated in the published tariffs of the carrier, will operate to relieve the carrier from the duty of collecting the lawful charges. (See ruling 235.)

**21. CARETAKERS OF MILK.**—The provision of law relating to the free transportation of necessary caretakers of live-stock, poultry, and fruit can not be construed to include caretakers of shipments of milk.

**NOTE.**—Under the amendatory act of June 18, 1910, free transportation may be accorded to caretakers of milk.

**22. FREE CARRIAGE OF COMPANY MATERIAL.**—It is not unlawful for a carrier to return its own property free of charges, to the manufacturers thereof situated on its own line, for exchange or repair.

**23. EXTENSION OF TIME ON THROUGH PASSENGER TICKETS.**—(Withdrawn in ruling 43.)

**24. CANADIAN FARES.**—A Canadian carrier having joint through fares from a point in the United States to points on its own line may not depart from those fares by the device of placing an agent at such point in the United States with authority to sell tickets from the first station on its line north of the Canadian boundary to other points on its line in Canada at the rate of 1 cent a mile, "to be sold only to such persons as produce a certificate of the immigration agent of the Canadian government." Besides being a device, tickets so limited to particular persons operate as a discrimination. But in the absence of such joint through fares from a point in the United States to points on its own lines this Commission has no jurisdiction over the fares actually charged and collected for the separate transportation between points in Canada. (See ruling 98.)

**25. REFUND OF DRAYAGE CHARGES CAUSED BY MISROUTING.**—(Restated in ruling 509.)

**26. USE OF INTRASTATE COMMUTATION TICKET IN INTERSTATE JOURNEY.**—In the absence of a provision in the commutation contract forbidding it, a commutation ticket may be used between the points named on it in connection with an interstate journey on trains that stop at such points.

*January 13, 1908.*

**27. EXCURSION TICKET INVALIDATED THROUGH FAILURE OF CARRIER TO MAKE CONNECTION.**—A passenger traveling on a special limited excursion ticket with stop-over privilege leaves a stop-over point in ample time to make all connections and meet conditions of ticket; but through successive delays to trains misses connections at a certain junction, making the ticket twenty-four hours out of date. Regular fare was collected for the balance of the return trip: *Held*, That the

carriers ought to make the ticket good, it having become invalid through their fault.

**28. TICKETS FOR TRANSPORTATION AND MEALS, HOTEL ACCOMMODATIONS, ETC.**—A carrier publishes a tariff offering certain transportation fares and rates for personally conducted tours with tickets to cover meals, hotel accommodations, etc., and declines to sell the transportation ticket to anyone who does not also purchase the tickets covering meals and hotel accommodations: *Held*, That the two matters must be kept separate, and carriers may not decline to sell such transportation without tickets for meals and hotel accommodations. (See ruling 384.)

**29. QUOTATIONS FROM CORRESPONDENCE OF THE COMMISSION.**—The Commission requests that if extracts from its correspondence are sent out by carriers, such extracts be made sufficiently full, or that sufficient of the correspondence be presented, to give a complete view and understanding of the meaning of the ruling and of the circumstances discussed, or of the inquiry answered therein.

*January 15, 1908.*

**30. CARRIERS' MONTHLY REPORTS TO BE FURNISHED IN DUPLICATE.**—Beginning as of January 1, 1908, monthly reports of revenues and expenses, as provided for in the order of the Commission, bearing date July 10, 1907, shall be filed in duplicate, and on or before the last day of the month immediately following the month covered by the report shall be deposited in the United States Post Office, postage prepaid, and plainly addressed to the Bureau of Statistics and Accounts, Interstate Commerce Commission, Washington, D. C.

**31. DEMURRAGE CHARGES ON ASTRAY SHIPMENTS.**—An astray shipment of perishable merchandise was not rebilled to its proper destination, but was sold by the consignee at the point where he found it. The delivering carrier at that point had assessed demurrage charges before the shippers were able to locate the car. That carrier expressed its willingness to waive the demurrage if the Commission permits: *Held*, That demurrage charges stand in the same light as transportation charges

and may be adjusted under ruling 217 of this Bulletin, formerly published as Rule 74 of Tariff Circular 15-A.

*February 3, 1908.*

**32. DEMURRAGE CHARGES.**—The delivering carrier is under obligation to collect demurrage charges assessed by it, although such charges may have accrued as the result of error on the part of another carrier. (See ruling 220-*f*; see also note to ruling 242.)

The shipper should pay the lawfully published rate via the route over which the shipment moved, pending dispute, and then make claim for refund. The Commission, in the adjustment of misrouting claims, will not ordinarily include demurrage charges. (See Ruling 220-*e*; also *Ed. Caddell & Sons v. C. & S. Ry. Co.*, U. R. Op. 177.)

When the delivering carrier demands more than the lawful rate, the consignee is released from the obligation to pay demurrage charges accruing during the pendency of the dispute as to the lawful rate. (See Code of National Car Demurrage Rules.)

**33. REDUCED RATE TRANSPORTATION FOR FEDERAL, STATE, AND MUNICIPAL GOVERNMENTS.**—Under section 22 of the act to regulate commerce, carriers may grant reduced rates for the transportation of property for the United States or for state or municipal governments, under arrangements made directly with such government and in which no contractor or other third person intervenes, without filing or posting the schedule of such rates with the Commission. (See rulings 36, 208*e*, 218, 244, 311, and 452.)

**34. COAL USED FOR STEAM PURPOSES NOT ENTITLED TO REDUCED RATES.**—A tariff providing for reduced rates on coal used for steam purposes, or that the carrier will refund part of the regular tariff charges on presentation of evidence that the coal was so used, is improper and unlawful. That is to say, the carrier has no right to attempt to dictate the uses to which commodities transported by it shall be put in order to enjoy a transportation rate. (See ruling 2; also *Board of Bristol, Tenn.*, v. *V. & S. W. Ry. Co.*, 15 I. C. C., 456; *In*

, *the Matter of Restricted Rates*, 20 I. C. C., 427; and *Divisions of Joint Rates on Railway Fuel Coal*, 37 I. C. C., 265.

**35. USE OF STATE PASSES IN INTERSTATE JOURNEYS UNLAWFUL.**—Passes granted to state railroad commissioners can not lawfully be used in interstate journeys.  
*February 4, 1908.*

**36. RATES ON SHIPMENTS FOR THE FEDERAL GOVERNMENT.**—If title to property, such as postal cards, passes to the Government at the point of manufacture, the carrier may agree upon a rate to be applied for transporting it for the government to another point, without filing a tariff with the Commission. But if the manufacturer under his contract is required to deliver to the government at such other point, the transportation must be under the published tariff rate. In other words, if the shipment is made directly by the government, this rate may be fixed by the carrier without posting and filing the tariff, but not otherwise. (See ruling 33, and ruling 244 rescinding ruling 65; also see ruling 452; also *United States v. A. & V. Ry. Co.*, 40 I. C. C., 406.)

**37. PASSES TO CARETAKERS.**—Passes to caretakers must be in the form of trip passes limited to the journey on which the person to whom the pass runs acts as a caretaker. It may also cover the return journey. Annual or time passes to caretakers are unlawful. (See ruling 1.)

**38. REPARATION ON INFORMAL COMPLAINTS.**—(Re-stated in ruling 396.)  
*March 3, 1908.*

**39. ACCRUED DEMURRAGE CHARGES.**—A shipper who had customarily paid his freight charges in checks was called upon, under a general order issued by the carrier, to pay his freight charges in cash during the recent financial disturbances. While the local agent was endeavoring to get authority from the home office of the carrier to continue to accept checks from this shipper, demurrage charges accrued: *Held*, That they could not lawfully be refunded. (See note to ruling 242.)

**40. PRINTING OF BRIEFS.**—(See current Rules of Practice.)

**41. DIVISION OF PROCEEDS OF SALE OF SHIPMENT TO PAY FREIGHT CHARGES.**—A shipment refused by the consignee and upon which demurrage had accrued was sold by the delivering carrier, but did not realize the amount of the transportation charges and the amount paid for unloading. Upon the request of the carrier the Commission declined to express its views as to the manner in which the proceeds of the sale should be divided among the several carriers participating in the movement, that being a matter to be determined by the interested carriers for themselves. (See rulings 114 and 145.)

**42. RATES ON RETURN MOVEMENTS.**—A shipment of mining machinery went to destination over the lines of one carrier and was subsequently returned for repairs over the lines of another carrier. The published tariff, to which all carriers participating in both movements were parties, provided for half rates on such return movements when over the same route as the original out-bound movement. A portion of the route of the return movement was over the line of a carrier which also formed a part of the through route over which the out-bound shipment moved: *Held*, That the regular tariff rate was properly applied on the return movement; that the return movement under through billing must be treated as a unit; and that there could be no refund on the basis of the half rates for any portion of such through return movement.

**43. EXTENSION OF TIME ON THROUGH PASSENGER TICKETS.**—The ruling heretofore announced under this head to the effect that an extension of time on a through ticket by a carrier whose line is a part of that route is binding on the lines of other carriers in the route, is now withdrawn. (Overruling ruling 23.)

**44. LIMITATIONS OF PASSENGER TICKETS.**—A passenger traveling on a round-trip ticket containing the provision that "This ticket will be good for return trip to starting point prior to midnight of date punched by selling agent in column 2. Final limit;" did not reach the last connecting carrier before the

date punched on the ticket. The passenger was required to pay full fare on the last connecting line: *Held*, That a refund could not lawfully be made.

**45. PASSENGERS ON FREIGHT TRAINS.**—Upon inquiry made by a carrier the Commission holds that it may not confine the right to travel on freight trains to a particular class, such as drummers and commercial agents, but if the privilege is permitted to one class of travelers it must be open to all others on equal terms and conditions.

**46. REPARATION ON INFORMAL PLEADINGS—PASSENGER TICKETS.**—The rulings of the Commission relating to reparation on informal complaints do not extend to passenger traffic, but are limited to freight traffic only. The Commission will not entertain applications for authority to refund on passenger tickets on the ground that the fare was reduced shortly after the ticket was sold. (But see rulings 113, 247, 266, 277, and 385; see also *Nonvalidation of Limited Excursion Tickets*, 19 I. C. C., 442.)

*March 9, 1908.*

**47. TARIFF TAKING EFFECT ON SUNDAY.**—Under a tariff schedule regularly filed, showing a change in published rates, it happened that the thirty days' notice required by law expired on Sunday: *Held*, That the tariff is lawful.

**48. MAY A SHIPPER OFFSET A CLAIM AGAINST A CARRIER BY DEDUCTION FROM FREIGHT CHARGES ON SHIPMENT?**—(Restated in ruling 323.)

**49. BENEFIT OF REPARATION ORDERS EXTENDS TO ALL LIKE SHIPMENTS.**—(Restated in ruling 220*d*; also see ruling 200*c*.)

**50. WHEN JOINT AGENT PUBLISHES A NEW RATE BETWEEN TWO POINTS, WITHOUT CANCELING THE OLD RATE DULY PUBLISHED BY ONE OF THE CARRIERS, THE OLD RATE ON THAT LINE REMAINS IN EFFECT.**—The published tariffs of an interstate carrier named a rate of 20 cents on a given commodity between specified points. On October 1, 1907, under a proper power of attorney, a joint agent of all carriers serving those two points published a rate

of 22 cents. He failed to cancel the 20-cent rate and it was not formally canceled by the carrier that published it until January 14, 1908; *Held*, That because of the failure of the joint agent and of the carrier that published it to cancel that rate in the manner required by section 6 of the act, and Rule 8 of Tariff Circular 14-A, the 20-cent rate remained the lawful rate of that carrier until formally canceled on January 14, 1908. See rulings 70, 101, 104, and 239. Rule 8 of Tariff Circular 14-A is now published as Rule 8 of Tariff Circular 18-A.)

*March 11, 1908.*

**51. THE USE OF PULLMAN CARS AT STOP-OVER POINTS CAN NOT BE LIMITED TO MEMBERS OF A PARTICULAR CLUB.**—A carrier desiring to make excursion rates to a point where a convention is to be held wishes to accord to members of certain clubs the privilege of occupying the sleeping cars while the convention is in session: *Held*, That the carrier may lawfully arrange an excursion rate to such point and return, the rate to include sleeping-car accommodations to and from that point with the privilege of occupying the car at that point during the convention; but that the Commission does not understand that the carrier may limit the privilege to the members of any particular club.

**52. RATE EASTBOUND CAN NOT BE APPLIED WESTBOUND UNLESS SO PUBLISHED.**—A mixed carload of meat eastbound was diverted at the Ohio River on account of a flood, and, by order of the shipper, was taken by a roundabout route to a point east of its destination and was thence hauled westbound to destination. The mixed-carload rate applied on eastbound shipments, but the tariffs provided no mixed-carload rate on westbound shipments: *Held*, That such interruption of the eastbound movement would not justify the application of a mixed-carload rate on the westbound movement to destination.

**53. TRANSIT PRIVILEGE NOT AVAILED OF CAN NOT BE RENEWED AFTER THE EXPIRATION OF THE TIME ALLOWED IN THE TARIFFS.**—A consignor of sheep, which were being grazed in transit, was unable because of a severe snowstorm to get the sheep to the station before the grazing privilege expired according to the published time limit. Upon

inquiry of the carrier it was held that it can not lawfully take the sheep forward on the rates which would have been applicable under the tariff had the sheep been shipped within the time limit. *March 16, 1908.*

**54. DEMURRAGE ON INTERSTATE SHIPMENTS.**—Questions of demurrage and car service on interstate shipments are within the jurisdiction of the Interstate Commerce Commission, which does not concur in the view suggested by certain state commissions that such matters, even when pertaining to interstate shipments, are within their control. (Reaffirmed by ruling 223b.)

**55. FREE PASS TO RAILWAY EMPLOYEE ON LEAVE OF ABSENCE.**—An employee who has not been suspended or dismissed from the service, but is on leave of absence and is still carried on the roll of employees of the carrier, is still an employee and as such may lawfully use free transportation.

*April 7, 1908.*

**56. HOURS-OF-SERVICE LAW—STREET-CAR COMPANIES.**—Upon inquiry whether the hours-of-service law applies to electric street car lines which are interstate carriers: *Held*, That it applies to all railroads subject to the provisions of the act to regulate commerce, as amended, including street railroads when engaged in interstate commerce. (See ruling 287.)

**57. RESHIPING RATE FROM PRIMARY GRAIN MARKETS.**—May a carrier lawfully cancel its local, reconsigning, proportional, and other rates, on outbound shipments of grain from a primary market like Kansas City, where no grain originates upon which the local rate would be applicable, and substitute for them a reshipping rate applicable on all outbound grain?

Responding to the inquiry the Commission approved the suggestion, but declines in advance to express approval of such

**NOTE.**—This ruling was made by the Commission on March 16, 1908; by the amendatory act of April 13, 1908, carriers were given the right to give free transportation to "furloughed, pensioned, and superannuated employees."

reshipping rate when it makes less than the published rate from an intermediate point.

**58. DECLARING A FALSE VALUATION IN VIOLATION OF SECTION 10.**—Upon an inquiry from a banking house whether it may lawfully declare a value of \$5,000 upon a package of negotiable bonds of the market value of \$10,000 and pay the express charges on the basis of the declared value, upon the understanding that in case of the loss of the bonds the express company will be responsible only for the amount so declared, it was held that a shipper falsely declaring the value of a package delivered to an express company for transportation violates section 10 of the act. (See ruling 295 and compare ruling 188; see also *Express Rates, Practices, Accounts, and Revenues*, 43 I. C. C., 510.)

**59. CARRIERS MUST SEND CAR THROUGH OR TRANSFER SHIPMENT EN ROUTE.**—Where connecting lines have united in publishing a joint through rate between two points it is the sense of the Commission that it is the duty of the carriers in the route to provide the car and permit it to go through to destination or to transfer the property en route to another car at their own by rulings 92 and 95c.

**60. NO REFUND TO PASSENGER WHO EXCEEDED STOP-OVER LIMIT.**—A passenger, while availing himself of a stop-over privilege at a certain point in his journey, was subpoenaed as a witness in a proceeding in a civil court, and obeying the process was not able to proceed on his journey within the time limit of the stop-over. As a result he was compelled to pay an additional fare from that point to destination: *Held*, That a refund could not lawfully be made.

**61. STORAGE CHARGES ON TRUNK ACCRUING BECAUSE OF INJURY TO PASSENGER.**—The Pullman car in which a passenger was traveling was derailed and went over an embankment, resulting in an injury to a passenger, who in consequence was detained for some time. His trunk was taken on to destination and storage charges accrued on it until claimed by him. *Held*, That the storage charges might lawfully be refunded.

*April 14, 1908.*

**62. BOATS THAT ARE NOT COMMON CARRIERS.**—Certain carriers have been in the habit of advancing the charges of sailing vessels, boats, and barges bringing vegetables to their terminals to be forwarded to interstate destinations, and of entering the amount on waybills as charges in addition to their tariff rates. Upon inquiry whether the carriers may lawfully continue this practice it was held that if the boats are common carriers, making regular trips and offering their services to the general public, they must file tariffs and the practice must be discontinued until they do so. (See ruling 428; also ruling 444.)

**63. SERVANTS MAY NOT USE FREE PASSES.**—(Amended by rulings 92 and 95c.)

**64. ABSORPTION OF SWITCHING CHARGES.**—The tariff of a carrier provided for the absorption of switching charges. Upon inquiry it was agreed that the Commission could not sanction a practice under which switching charges are paid by the consignee, the carrier deducting the amount of the switching charges from the published rates and collecting the balance from the consignee. In all cases the carrier must collect the full tariff rates. Where its tariffs provide for absorptions of switching charges the carrier must pay the switching company for its services and not leave that to be done by the shipper.

**65. SPECIAL RATES FOR UNITED STATES, STATE, OR MUNICIPAL GOVERNMENTS.**—(Overruled and withdrawn by ruling 244; also see ruling 208e.)

*May 4, 1908.*

**66. JOINT RATES BETWEEN A WATER AND A RAIL CARRIER SUBJECTS THE FORMER TO THE PROVISIONS OF THE ACT.**—A steamboat line agreed upon joint rates with a rail line for certain passenger and freight traffic: *Held*, That it could not unite with a railroad company in making a through route and joint rate on a particular traffic without subjecting all its interstate traffic to the provisions of the law and to the jurisdiction of the Commission.

*In the Matter of Jurisdiction Over Water Carriers*, 15 I. C. C., 205, the Commission held that carriers of interstate commerce by water are subject to the act to regulate commerce only in respect of traffic transported under a common control, management, or arrangement with a rail carrier, and in respect of traffic not so transported they are exempt from its provisions, (See rulings 155, 201, 354, 401, and 422; also *Kansas City Missouri River Navigation Co. v. C. & O. Ry. Co.*, 34 I. C. C., 67.)

**67. HANDHOLDS—SAFETY-APPLIANCE LAW.**—The law makes no distinction between passenger and freight cars, and handholds must, therefore, be placed on the ends of passenger cars and cabooses.

**68. ADJUSTMENT OF CLAIMS.**—(Restated in ruling 236; also see ruling 462.)

**69. ERROR BY TICKET AGENT.**—A station agent inadvertently failed to indorse "colonist ticket" on a regular ticket sold upon a published colonist rate: *Held*, That the connecting carriers must be paid their full proportion of the first-class rate, but that the Commission would not intervene between the initial carrier and its agent. (Reaffirmed by ruling 277; see also ruling 105.)

*May 5, 1908.*

**70. EFFECT OF A FAILURE IN A NEW TARIFF NAMING HIGHER RATES TO CANCEL THE SAME RATES IN PRIOR TARIFF.**—A carrier's tariff, effective January 1, 1903, named certain rates between two points. By a joint tariff, effective February 1, 1908, higher rates were named between the same points, but without reference to the previous tariffs or cancellation of the lower rates therein. On March 26, 1908, a supplement was filed, naming the same higher rates and canceling the rates named in the tariff of January 1, 1903: *Held*, That until March 26, 1908, when the original rates were canceled, they remained in effect and were the lawful rates. (See rulings 50, 101, and 104; compare ruling 239.)

**71. DIFFERENT FARES TO DIFFERENT SOCIETIES UNLAWFUL.**—A tariff covering daily picnic excursions between certain points for the season named fares for Sunday and

day schools and different fares for "societies:" *Held*, That the tariff is discriminatory and that the fares for the school picnic should be the same as for society picnics. (See ruling 99.)

**72. RECONSIGNMENT PRIVILEGES AND RULES.**—(a) Usually the combination of intermediate rates is higher than the through rate. Frequently a shipper desires to forward a shipment to a certain point and have the privilege of changing the destination or consignee while shipment is in transit, or after it arrives at destination to which originally consigned, and to forward it under the through rate from point of origin to final destination. Many carriers grant such privilege and generally make a charge therefor.

(b) The privilege is of value to the shipper, and in order to avoid discrimination it is necessary for carrier that grants such privilege to publish in its tariff that fact, together with the conditions under which it may be used and the charge that will be made therefor. Such rules should be stated in terms that are not open to misconstruction.

(c) Some carriers do not count a change of consignee which does not involve a change of destination as a reconsignment, while others do consider it a reconsignment and charge for it as such. The commission holds the view that without specific qualifications the term "reconsignment" includes changes in destination, routing or consignee. If carrier wishes to distinguish between such changes in its privileges or charges it must so specify in its tariff rules. Reconsignment rules and charges must be reasonable, and a charge that would be reasonable for a diversion or change of destination might be unreasonable when applied to a simple change in consignee which did not involve change in destination or more expensive delivery. (This rule is the same as rule 74 of Tariff Circular 18-A. See *Beekman Lumber Co. v. K. C. Ry. Co.*, 17 I. C. C., 87; *Doran & Co. v. N. C. St. L. Ry.*, 33 I. C. C., 527; and *Atwood & Co. v. C., B. & Q. R. R. Co.*, 42 I. C. C., 386.)

**73. EFFECTIVE DATE OF TARIFF FILED BY A CARRIER** in interstate transportation, failed to note an effective date on its carrier, under its arrangements for the first time to participate **RIER WHEN FIRST COMING UNDER THE LAW.**—A

first tariff schedule: *Held*, That being that carrier's first tariff it became effective as soon as filed. (See rulings 12 and 100b.)

**74. HOURS-OF-SERVICE LAW.**—Employees deadheading on passengers trains or on freight trains and not required to perform, and not held responsible for the performance of, any service or duty in connection with the movement of the train upon which they are deadheading, are not while so deadheading "on duty" as that phrase is used in the act regulating the hours of labor. (See ruling 287b.)

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*May 12, 1908.*

**75. VALIDATION OF TICKETS.**—The condition that a roundtrip passenger ticket shall be validated for the original purchaser by carrier's agent at a given point is one of the conditions which affects the value of the service rendered the passenger and one of the conditions that must be observed the same as the rate under which the ticket is sold, which must therefore be stated in the tariff under which it is sold. The tariff may provide for validation at numerous points, and it may provide for validation at any point intermediate to the original destination named in the ticket. The condition stated upon the ticket should not conflict with the tariff provisions, but if in any case there should inadvertently be conflict between the tariff provisions and the conditions stated on the ticket the tariff rule must govern. (See rulings 125 and 167.)

**76. REDEMPTION OF PASSENGER TICKETS.**—The unused portion of a passenger ticket, when presented by the original holder to the carrier that issued it, may lawfully be redeemed by the carrier by paying to the holder the difference between the value of the transportation furnished on the ticket at the full tariff rates and the amount originally paid for the ticket. (See rulings 115, 228, 238, 265, and 303.)

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*May 14, 1908.*

**77. TRANSIT PRIVILEGES NOT RETROACTIVE.**—Ruling 6, providing that the benefit of reconsignment privileges can not be given retroactive effect, is held to include cleaning, milling,

concentration, and other transit privileges. (See ruling 166; also *Henry v. Eastern Ry. Co.*, 20 I. C. C., 172.)

June 1, 1908.

**78. GRAIN DOORS.**—(a) A carrier may not lawfully reimburse shippers for the expense incurred in attaching grain doors to box cars unless expressly so provided in its tariff. There is a material difference between the furnishing of service or facilities to carriers by one who is not a shipper and the furnishing of the same facilities or services by one who is a shipper. (See rulings 19, 292, and 360.)

(b) The Commission now decides that its ruling above and the requirements of the law thereunder will, for the present at least, be satisfied if the carriers that propose to pay shippers for grain doors furnished by such shippers provide in their tariffs that where grain doors are necessary and are furnished by the shipper the carriers will pay the actual cost of such doors, with stated maximum allowances per grain door and per car. (Affirmed by ruling 267.)

(c) Such maximum allowances per door and per car must be reasonable, and where carrier pays for such doors on the basis of actual cost certified statement from shipper, verified, as to the number of doors furnished and the cars for which furnished, by carrier's agent, should in every instance be required. (Reaffirmed by ruling 267; see ruling 132; also *Loomis v. L. V. R. R. Co.*, 240 U. S., 43 *National Lumber Ass'n v. A. C. L. R. R. Co.*, 14 I. C. C., 154; and *N. Y. Shippers Ass'n v. N. Y. C. & H. R. R. R. Co.*, 30 I. C. C., 437.)

June 2, 1908.

**79. "PRIVATE SIDE TRACKS" AND "PRIVATE CARS" DEFINED.**—(a) (Modified and restated in ruling 121.)

(b) A private car is defined in the opinion as "a car owned and used by an individual, firm, or corporation for the transportation of the commodities which they produce or in which they deal." It will include also cars owned and leased to shippers by private corporations. (Qualified by ruling 122; also see ruling 128.)

(c) The ruling as to demurrage charges on private tank cars is applicable to all other private cars used by the railroads and paid for on a mileage basis. (See ruling 222.)

(d) It is not the intention of the Commission that its ruling shall be given a retroactive effect. The demurrage question has been in a state of great confusion, and the desire of the Commission is to establish a uniform, fair, and practicable system for the future. Claims for refund of demurrage charges previously collected in accordance with regular tariff rules will not be entertained with favor. (See rulings 123, 128, 222, and note to ruling 242; see also Rule 75 of Tariff Circular 18-A.)

*June 9, 1908.*

**80. SHIPMENT THAT MOVED IN UNDER A FORMER TARIFF DOES NOT LOSE THE BENEFIT OF TRANSIT PRIVILEGES CANCELED PENDING THE OUT MOVEMENT.**—A tariff enabled shippers to concentrate commodities on local rates at a certain point for shipment within a named period in carload lots, the in-bound billing to be surrendered and through rates from point of original shipment to apply. Before the period for taking advantage of this privilege had expired a new tariff made a new arrangement: *Held*, That with respect to shipments that had moved to the concentrating point under the old tariff and which moved out within the period therein allowed, the old rate should apply. (See *Isbell-Brown Co. v. G. T. W. Ry. Co.*, U. R. Op. A-908.)

**81. SUPPLEMENTING MILEAGE BOOKS BY PAYING REGULAR LOCAL MILEAGE RATES.**—The practice under a published tariff rule which permits the holder of a mileage book which does not contain enough coupons to enable him to complete his journey to pay for the balance of the journey at the regular local rate per mile, as published by the carrier, is not unlawful. (See ruling 382.)

**82. CHARTERING TRAINS.**—It is not unlawful for a railroad company to publish a tariff under which a locomotive and train of cars may be chartered at a named rate, tickets for the journey on that train to be sold by the person chartering the train.

**83. BLOCKADE BY FLOOD.**—A carrier accepted a car-load shipment for movement to a point beyond its line. After delivering the shipment to a connection at a junction point it was advised that the connecting line had been closed by floods. The initial carrier accepted the return of the car from that line and ordered it forward to destination via another route carrying higher rates, taking this action without instructions from the shipper: *Held*, That the initial line was responsible to the shipper for the resulting increase in the transportation charges. (See rulings 146, 147, and 213-a; also *Woodward & Dickerson v. L. & N. R. R. Co.*, 15 I. C. C. 173; *Weyl-Zukerman & Co. v. C. M. Ry. Co.*, 27 I. C. C. 495; and *Morse Lumber Co. v. L. & N. R. R. Co.*, 33 I. C. C. 572.)

**84. A COMMODITY RATE TAKES THE COMMODITY OUT OF THE CLASSIFICATION.**—A carrier having a high class rate on furniture with a low minimum also had a lower commodity rate with a higher minimum. In response to an inquiry whether they are privileged to use either rate as they desire: *Held*, That the only purpose of making a commodity rate is to take the commodity out of the classification. The commodity rate is, therefore, as stated in Rule 7, Tariff Circular 15-A, the lawful rate. And if the carrier does not desire to apply it on all shipments it must be canceled. (See also Rule 7 of Tariff Circular 18-A.)

**85. SUBSTITUTING TONNAGE AT TRANSIT POINTS.**—(Restated in Ruling 203.)

**86. POSTING TARIFFS AT STATIONS.**—Under the order of the Commission of June 2, 1908, entitled "In the Matter of Modification of the Provision of Section Six of the Act with Regard to Posting Tariffs at Stations," if a subsidiary or small connecting line has authorized the parent company, or principal connecting line, to publish and file for it all of its tariffs, tariffs so issued and filed on its behalf will be included in the complete public tariff files of the parent or issuing line, and it will not be necessary for such subsidiary or small line to maintain an additional complete public file. (See also ruling 289.)

The order above mentioned was in effect superseded by an order of October 12, 1915, relating to the same matter.

**87. TRANSPORTATION FOR EATING HOUSES OPERATED BY OR FOR CARRIERS.**—Carriers subject to the act may provide at points on their lines eating houses for passengers and employees of such carriers, and property for use of such eating houses may properly be regarded as necessary and intended for the use of such carriers in the conduct of their business. Such eating houses, however, must not serve the general public, or any portion thereof, with food prepared from commodities which have been carried at less than the full published rate, and no utensils, fuel, or servants at all employed in serving others than passengers and employees of the carrier as such should be carried at less than tariff rates. Such privileges as may be extended under this rule shall be applied only as to points local to the line on which the eating house is situated. (Compare ruling 124; and see ruling 340.)

**88. HOURS-OF-SERVICE LAW.**—(a) The specific proviso of the law in regard to hours of service is:

“That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period or not exceeding three days in any week.”

These provisions apply to employees in towers, offices, places, and stations, and do not include train employees who, by the terms of the law, are permitted to be or remain on duty sixteen hours consecutively or sixteen hours in the aggregate in any twenty-four hour period, and who may occasionally use telegraph or telephone instruments for the receipt or transmission of orders affecting the movement of trains. (See ruling 287.)

The commission decided in conference on April 9, 1917, to rescind paragraph (b) of this ruling, because the question upon

which it was made has since been judicially interpreted and is now pending in the courts upon appeal.

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*June 29, 1908.*

**89. JURISDICTION OF ACT OVER LOCAL BELT OR SWITCHING LINES.**—The question is asked, "Is a belt line owned by a municipality, which participates in interstate movements, subject to the jurisdiction of the act and of the Commission?" *Held*, That it is subject to such jurisdiction. ( Compare ruling 162.)

**90. MISROUTING VIA LINE THAT HAS NO TARIFF ON FILE.**—A shipment was misrouted and passed over a route via a part of which no rate was filed with the Commission, and was thus subjected to a higher charge than the through rate via the proper route: *Held*, That misrouting carrier may be authorized to make refund on account of its error in misrouting shipment, and that carrier which participated in the transportation without lawful tariff applicable thereto should be dealt with through the Division of Prosecutions. (See ruling 93.)

**91. A MUCH LONGER AND MORE INDIRECT ROUTE NOT A REASONABLE ROUTE.**—A shipment was tendered destined to a certain point, the direct route to which was over the lines of two carriers, a distance of 358 miles, the rate via that route being 22 cents. It was possible to send the shipment around over the lines of three carriers, a distance of 617 miles, and secure a combination rate of only 19 cents. Application for refund was made on account of the difference between the rates: *Held*, That the claim for refund should be denied on the ground that the much longer and indirect route is not a reasonable route. (See ruling 214; also *R. B. Homer Lumber Co. v. S. A. L. Ry.*, U. R. Op. A-351.)

**92. USE OF PASSES BY SERVANTS.**—Opinion expressed on April 14, 1908, on the subject of use of passes by servants, is modified: *Held*, That a household servant when traveling with a member of the family entitled to a pass is included within the term "family" as used in the act. (Amending ruling 63; see also ruling 95c.)

*June 30, 1908.*

**93. MISROUTING INVOLVING CARRIERS NOT SUBJECT TO THE ACT.**—A shipment was tendered to a carrier in North Carolina, destined to California. Shipper requested that it be sent via New York and the Isthmus of Panama. Shipment was forwarded all rail under a rate alleged to be higher than would have applied via the route indicated: *Held*, That the Commission can not authorize refund because no tariffs are on file with the Commission via route which the shipper directed the shipment moved, and there is therefore no official measure of the accuracy of the claim for overcharge or the amount thereof. (See rulings 90 and 214.)

**94. LEASING CARRIER'S PROPERTY IN CONSIDERATION OF LESSEE'S SHIPMENTS.**—A carrier leases a part of its property to a certain industry under a contract which contains the obligation on part of the lessee industry to make all of its shipments by the line of the lessor carrier. Such a provision plainly implies that the traffic so furnished by the lessee and so secured by the lessor is an important and substantial consideration which might amount to a concession in the rates for transportation, and therefore, be an unlawful device or discrimination. The Commission expressed doubt as to the propriety of the practice. (See rulings 325 and 421.)

**95. NOTICE AS TO THE ISSUANCE OF PASSES.**—It appearing that the ruling issued by the Commission on the 9th day of June, A. D. 1908, relative to the issuance and use of passes, should be modified in certain respects relating to the forms of passes to persons eligible to receive free transportation under the act to regulate commerce, it is ordered that said ruling shall be amended to read as follows:

(a) Many abuses in the issuance and uses of passes have been discovered by the Commission which it is desired to correct, and to this end, and because of the misinterpretation of the law by carriers generally, the Commission at this time makes announcement that it will recommend the indictment and prosecution of all carriers and persons issuing passes to, or allowing the use of passes by, any persons not included within the designated classes to whom free transportation may be given by carriers subject

to the act to regulate commerce as set forth in said act. Among those not included under the provisions referred to are the following:

1. Officers or employees of news companies other than newsboys. (See *Transportation of Newspaper Employees*, 12 I. C. C., 15.)
2. Officers or employees of Telegraph or Telephone companies, excepting when personally engaged in operation, extension, repair, or inspection of lines upon or along the railroad right of way and used in connection with the operation of The railroad. The amendatory act of June 18, 1910, brings Telephone and Telegraph companies within the jurisdiction of the Commission; see ruling 305; see also rulings 161 and 219.)
3. Officers or employees of surety, transfer, and baggage companies, except baggage agents. (See ruling 216, also *U. S. v. Erie R. R.*, 236 U. S. 259.)
4. Officers or employees of carriers not subject to the act to regulate commerce, including officers and agents of steamship and stage lines not subject thereto. (See ruling 196; also 95c and 475.)
5. Officers or employees of subsidiary corporations engaged in business other than transportation subject to the act to regulate commerce, save that such officers and employees may be granted free transportation when attending to business imposed upon a carrier subject to the act. (See rulings 169, 208, and 263.)
6. Families of local attorneys, surgeons, and others who are not regularly employed by carriers. (See ruling 208a.)

(b) Each pass issued must bear upon its face the name of some person belonging to a class named in section 1 of the act as eligible to receive free transportation. In addition to such person so named a pass may also carry not to exceed a specified number of unnamed persons of any class eligible to receive free transportation; the number and the class to which such person belongs being specified upon the face of the pass—that is to

say, passes in the following forms will be recognized by the Commission as legal:

"Pass John Smith, President, car, and five officers and employees of the Z. Y. & Z. Railway."

"Pass J. R. Barner and six linemen, foreman, and force of the Western Union Telegraph Company. Good only when traveling in connection with the construction, maintenance, or operation of the lines of the Western Union Telegraph Company on the right of way of this A. B. C. Railway."

"Pass one extra messenger of the Southern Express Company when presented with letter signed by Superintendent, Assistant Superintendent, or Route Agent of said Express Company, authorizing use and giving name of person to be passed."

"Pass John Smith, section foreman, and six employees of X. Y. & Z. Railway."

(c) The Commission holds the the word "family," as used in section 1 of the act to regulate commerce, includes those who are members of, and who habitually reside in, the household of the person eligible to receive family passes, including household servants when traveling with the family or with any member thereof, and relatives who are in fact dependent upon such person although not actually residing in his household. (See rulings 92, 174, and 417.) The Commission will, therefore, view passes in the following form as lawful:

"Pass John Smith, wife, two sons, three daughters, and two servants."

"Pass Mrs. John Smith and daughter, account John Smith. Agent X. Y. & Z. Railroad Company at Washington, D. C."

(d) The name of the person presenting the pass must appear upon it. Passes intended to be used in the absence of the head of the family whose occupation makes the issuance of passes lawful must, in addition to the name of said head, show the name of the person using the same. (See ruling 290.) For instance, a pass to be used by John Smith, his wife, or his daughter, separately, should read:

"Pass John Smith, Mrs. John Smith, and Miss Mary Smith, account C. & O. Agent at Richmond, Va."

(e) Every pass to an officer or employee of a carrier other than the one issuing the pass, shall indicate the name and rank of the person to, or on behalf of whom, such pass is issued, as well as the name of the carrier employing him.

(f) The Commission construes the act, so far as it relates to railway-mail service employees, as giving such employees the right to receive free transportation when on duty in their cars, or when traveling under orders from a superior officer. The Commission does not now undertake to say how far this portion of the act to regulate commerce is modified or controlled as regards railway-mail service employees by other statutes or by contracts between carriers and the Post Office Department. (See ruling 377.)

(g) The Commission will recognize any rail or water carrier filing a tariff, joint or local, with the Commission, as a carrier subject to the act so far as the issuance of passes to its officers and employees may be concerned. Where a carrier has no tariffs, on file with the Commission, and does not acknowledge itself subject to the Commission's jurisdiction, the Commission will regard the issuance of passes to its officers or employees as unlawful, without, however, thereby passing upon the question of the jurisdiction of the act over such carrier in so far as it may be necessary to assert such jurisdiction. In this regard reference is made to *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.*, 13 I. C. C., 266, and *In re petition Frank Parmelee Co.*, 12 I. C. C., 39. By reference to those decisions it will be seen that among the carriers not subject to the act are ocean carriers to nonadjacent foreign countries and domestic carriers by wagon, stage, or automobile. Carriers covered by these decisions are not eligible to file tariffs or receive passes. (See rulings 196, 216, 263, 355, and 475.)

(h) The Commission reaffirms Rule 63 of Tariff Circular 15-A, Now reported as ruling 208 of this bulletin.

(i) The Commission can not undertake, in any case, to determine whether or not individuals are within any of the classes mentioned in section 1 of the act as eligible to receive free transportation.

(j) The Commission will not regard as unlawful allowance of use, or the use of passes merely irregular in form, under

this ruling, during the present calendar year. Passes, however, issued to persons not eligible to receive the same must be called in at once, as well as passes so loosely framed that persons not eligible to receive free transportation may be carried upon them—that is to say, a pass to “John Smith, family, and household servants,” although irregular in form, will not be regarded by the Commission as unlawful prior to January 1, 1909. A pass, however, to “John Smith, car, and party,” being susceptible of use for the transportation of persons not within the act, should be immediately corrected.

(k) Carriers are enjoined against the destruction of records or memoranda touching the issuance of passes, and the passes, themselves, coming into the hands of the carriers after use, must, until further order of the Commission, be retained for a period of not less than five years. (See Commission’s Regulations to Govern Destruction of Records of Steam Roads Effective July 1, 1914, and Regulations to Govern Forms and Recording Passes, Effective Jan. 1, 1917.)

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*October 12, 1908.*

**96. DEMURRAGE ON F. O. B. SHIPMENTS.**—A purchased a carload of lumber f. o. b. at the milling point. Demurrage accrued on account of the failure of B, the mill owner, to promptly load the car. Carrier inadvertently delivered the car to A without collecting the demurrage. Upon its inquiry as to whether to demand the demurrage from A or B: Held, That the demurrage must be collected by the carrier either from the vendor or the vendee, but that the Commission can not undertake to investigate the facts and determine for the carrier whether the vendor or the vendee is liable for the charges. (See note to ruling 242; also *Crescent Coal & Mining Co. v. B. & O. R. R. Co.*, 23 I. C. C. 83.)

**97. COLLECTION BY CARRIER OF L. C. L. SHIPMENTS.**—The Commission condemns as unlawful a practice under which a carrier provides an empty car at factory sidings, in which the shipper may load L. C. L. shipments which the carrier then moves to its regular freight station where the shipments are assorted and placed in other cars to be forwarded

to their respective destinations. Such practices lawful only under definite and clear tariff authority, nondiscriminatory in terms and in its application. (See *Trap or Ferry Car Service Charges*, 34 I. C. C., 521.)

**98. LOCAL BILLING TO AVOID HIGHER THROUGH RATE.**—A lawful through rate existed between two points, applicable over two routes, one of which was directed, and therefore not ordinarily used by the carrier for through movements. The shipper billed locally to a point on the latter route, and rebilled to destination without taking either constructive or actual possession of the shipment at the local point, but making his rebilling arrangements with the agent of the carrier at a distant point. Upon arrival of the shipment at destination, the carrier collected the balance of the through rate: *Held*, That the local billing was not in good faith, but was a device between the shipper and the carrier's agents to avoid the higher through rate by having the carrier's agents act as the forwarding agent of the shipper; therefore the through rate is only rate lawfully applicable. Affirmed in Ruling 337. (See also rulings 24 and 365; also *In re Wharfage Facilities at Pensacola, Fla.*, 27 I. C. C., 258; *Doran & Co. v. N. C. & St. L. Ry.*, 33 I. C. C., 527; and *Kanotex Refining Co. v. A., T. & S. F. Ry. Co.*, 34 I. C. C., 271.)

**99. REGULATIONS GOVERNING COMMUTATION TICKETS MUST NOT DISCRIMINATE AS BETWEEN CLASSES OF PERSONS.**—(a) A Carrier offers a 46-trip monthly commutation ticket and provides that it shall be issued only to pupils, without regard to age, who are in attendance on schools of a certain kind or class, and specifically provides for the exclusion of pupils attending various other kinds of schools: *Held*, That this regulation is unjustly discriminatory, and therefore unlawful, but that carrier may lawfully offer and use a commutation ticket limited in its sale and use to children or young persons between certain stated ages (as, for instance, from 12 to 21 years of age).

(b) Such arrangement will provide desired rates for school pupils and will not exclude other children traveling under substantially similar circumstances but for the purpose of

securing other lines of instruction or on other missions. It will also protect against the use of such ticket by adults. The carrier may not inquire into the mission, errand, or business of the passenger as a condition of fixing the transportation rate which such passenger shall pay. (See ruling 71; also *Commutation tickets to School Children*, 17 I. C. C., 144.)

**100. EFFECTIVE DATE OF TARIFF THAT WAS USED BEFORE AUGUST 28, 1906, BUT WAS NOT FILED UNTIL AFTER THAT DATE.**—(a) Prior to the effective date of the amended act some carriers used the car-service rules of car-service associations under which to assess demurrage and other terminal charges, but did not file those rules with the Commission until after the amended act became effective. Such publications bore effective dates antedating their filing, but indicated no specific date subsequent to the date of filing upon which the schedule should become effective. The question is raised as to whether such publications so filed became effective on date of filing or thirty days subsequently thereto: *Held*, That prior to August 28, 1906, as well as subsequent to that date, the law required carriers amenable to its provision to file with the Commission and post to the public schedules containing their terminal charges “and any rules or regulations which in any wise change, affect, or determine any part or the aggregates” of their rates, fares, and charges. The amended act prohibits carrier from engaging or participating in transportation of passengers or property, as defined in the act, unless the rates, fares, and charges upon which the same are transported have been filed and published in accordance with the provisions of the act.

(b) The Commission has decided that, excepting the first tariff under which a carrier engages in interstate transportation, a tariff that is filed without naming date on which it is to take effect is unlawful and never becomes effective, and now decides that publications that were used prior to the effective date of the amended act, that were filed subsequent to that date and which bore effective date antedating the date of filing thereof, became effective thirty days subsequent to the date of filing the same. (See rulings 12 and 73.)

**101. CANCELLATIONS IN TARIFFS MUST BE SPECIFIC AND COMPLETE.**—Carrier's tariff contains certain rates. Joint agent's tariff canceled certain of those rates, but the carrier did not issue any corresponding amendment to its tariff, as is required by Rule 8, Tariff Circular 15-A. It is essential that when one tariff cancels a part of another tariff, specific reference to the tariff so affected and to the part thereof so canceled shall be given, and that, effective on the same date, supplement to the tariff so canceled in part shall show that the specific parts are canceled by, and that the rates will thereafter be found in—tariff, I. C. C. No.—. In no other way can discriminations and complaints be avoided. The carrier knows that such parts of its tariff are to be canceled and that superseding rates are to be shown in another tariff. There is, therefore, no difficulty about arranging its supplement and furnishing it to the proper party to be filed with the issue that contains the superseding rates. (See rulings 50, 70, 104, and 239; Rule 8, Tariff Circular 15-A, amended accordingly; see Rule 8 of Tariff Circulars 17-A and 18-A.)

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*October 13, 1908.*

**102. FREE PASSES TO EX-EMPLOYEES.**—Under the recent amendment to the antipass provision of section 1: *Held*, That a pass may be issued to a bona fide ex-employee of any carrier subject to the act, who is traveling for the purpose of entering the service of any such common carrier, whether such service has or has not previously been arranged for. (See ruling 158.)

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*October 16, 1908.*

**103. FREE PASSES TO FAMILIES OF EMPLOYEES.**—Upon an inquiry involving an interpretation of the recent amendment to the antipass provision of section 1, providing that free transportation may be given to the families of employees killed in the service of common carriers: *Held*, that the provision does not include the families of employees who died a natural death while in the service of common carriers. (See rulings 188, 173, 193, and 476.)

**104. CONFLICT IN PASSENGER TARIFFS.**—Certain fares of a carrier had been published in a joint agent's tariff and also in its own tariff. The carrier issued a new tariff canceling the fares in its own tariff, but did not secure their cancellation in the joint agent's tariff: *Held*, That the new tariff was unlawful because in conflict with the uncanceled tariff of the joint agent. (See rulings 50, 70, 101, and 239; also *Stilwell v. L. & N. R. Ry. Co.*, 19 I. C. C. 405.)

**105. PASSENGER TICKET HONORED BY WRONG LINE.**—A coupon reading over one line was honored through error by the conductor of another line running between the same points, and the latter called upon its conductor to make good the amount: *Held*, That the matter was one of discipline between the company and its conductor, and was not cognizable by the Commission. (See rulings 69 and 277.)

**106. TARIFFS FOR THE TRANSPORTATION OF EXPLOSIVES.**—Under a special act of Congress the Commission prescribed certain regulations governing the transportation of explosives. Such regulations are law to the carriers as well as to the shippers, and they can not be changed except by act of Congress or by this Commission. It is therefore not considered necessary for each carrier to file with the Commission copy of such regulations as a tariff issue, but it is considered necessary that each tariff which contains rates for the transportation of explosives shall also contain notice that such rates are applicable in connection and in compliance with the regulations fixed by the Interstate Commerce Commission. This provision must be in every such tariff issued hereafter, and must be incorporated in existing tariffs by reissue or supplement as early as practicable.

If tariff is governed by classification it will be sufficient to include the notice in the classification referred to as governing the tariff. (Rule 4, Tariff Circular 15-A; amended accordingly; see also Rule 665 of Tariff Circular 18-A; also see ruling 388.)

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*November 10, 1908.*

**107. REDUCED FARES FOR THE DEPORTATION OF CHINESE NOT PERMISSIBLE.**—Special fares can not lawfully be accorded by carriers for the transportation of Chinese to the ports for deportation, even though the expense is paid by the Government.

Provision for the subsistence and care in transit of Chinese being deported are matters of contract between the carrier and the Government, and need not be published in the tariffs.

**108. HOURS-OF-SERVICE LAW—FERRY EMPLOYEES.**—The hours-of-service law does not apply to employees on a ferry, even though the ferry be owned by a railroad company. The law applies to employees connected with the movement of trains, and hence does not embrace employees engaged only in the operation of a ferry. This ruling does not apply to car ferries. (See ruling 287.)

**109. TRANSPORTATION OF HOUSEHOLD GOODS OF AN EX-EMPLOYEE.**—A carrier gave free transportation to an employee and his household effects to the point where he was to be employed, and later dismissed him: *Held*, That the Commission can not require the carrier to return the household effects free of charge to the point from which they were first moved. (Reaffirmed by ruling 255; see also ruling 208b.)

**110. REPAYMENT BY CARRIER ON ACCOUNT OF SWITCH TRACK.**—A shipper in 1895 paid \$200 to a carrier as part of the cost of constructing a spur track to its warehouse. Upon application of the carrier for permission to repay the amount to the shipper: *Held*, That the repayment would be unlawful unless the shipper had some equity or ownership in the track which he could transfer to the carrier in consideration of the payment. (See ruling 512.)

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*November 12, 1908.*

**111. CHANGE OF RATE WHILE SHIPMENT WAS ON THE OCEAN.**—A shipment of linoleum left Hamburg on July

4, at which time there was in effect a published through rate to San Francisco via New Orleans of \$1.10. When the shipment reached New Orleans the through rate had been canceled, leaving in effect a local rate from New Orleans to San Francisco of 90 cents. Upon application for permission to refund down to the \$1.10 through rate: *Held*, That the application must be denied. (See *Borgfeldt & Co. v. Southern Pacific Co.*, 18 I. C. C., 553.)

**112. CARETAKERS FOR BEES IN HIVES.**—Upon inquiry from a classification committee it was agreed that tariffs may lawfully provide for free transportation of caretakers of bees in hives.

**113. ERRORS OF CARRIER'S AGENTS.**—Agents of carriers sometimes misroute passengers or by other error cause passengers to pay additional and unnecessary transportation charges. In the view of the Commission such cases are governed by the principles announced in Rule 70, Tariff Circular 15-A. (Reaffirmed by ruling 167; see also ruling 247, 266, and 277. Rule 70 of Tariff Circular 15-A is now published as ruling 214 of this Bulletin; also see *L. & N. R. R. v. Maxwell*, 237 U. S., 94.)

**114. RECONSIGNMENT OF REFUSED SHIPMENTS.**—It appears that in some instances carriers are willing to re consign refused shipments to points beyond the first destination and to apply the tariff rate from point of origin to final destination, even though it be lower than the rate to first destination, but they do not feel at liberty to do so in view of paragraph 2 of Rule 78, Tariff Circular 15-A. It is optional with the carrier whether or not it will grant reconsigning privilege. If granted, the conditions governing it must be in tariff, and if charges for back haul or out-of-line haul are to be assessed, rule must so state.

It is of course understood that satisfactory showing of genuine transaction and actual refusal by consignee will be required. (Rule 78, Tariff Circular 15-A, amended accordingly; now published as Rule 67 of Tariff Circular 18-A; see rulings 41 and 114.)

**115. REDEMPTION OF UNUSED PASSENGER TICKETS.**—Because of illness or other compelling reason a passenger sometimes abandons a trip short of destination to which fare has been paid, or returns from a point short of that to which he has purchased a round-trip ticket. On the question of the right of the carrier to refund fare in such a case the Commission decides that when the passenger has paid more than lawful tariff fares for the journey actually made the carrier may lawfully redeem unused ticket and make refund on the basis of lawful tariff fare for the service actually rendered, when investigation develops clear identity between purchaser of ticket and the one to whom refund is made. (Amending ruling 76; see also rulings 265, 303, and 350.)

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*November 13, 1908.*

**116. REFUND OF UNUSED PORTION OF ROUND-TRIP TICKET.**—Because of a washout of a portion of its tracks a carrier was unable to operate trains and thus return a passenger over that route within the time limited in a round-trip ticket which she held. A circuitous route was open to her, but on account of her age and the condition of her health she did not think it safe to take so long a journey, and therefore, waiting until the tracks had been repaired, which was after the expiration of the time limit of the ticket, she purchased a one-way ticket back to her home: *Held*, That as the carrier was not able to furnish the service which it undertook to furnish within the time limited in the round-trip ticket, it might lawfully refund the extra return fare so paid by the passenger. (See ruling 266.)

**117. DEMURRAGE WAIVED UNDER SPECIAL CIRCUMSTANCES.**—A sidetrack to an industry upon which a carrier had delivered 18 heavily loaded cars sank because of the marshy character of the roadbed: *Held*, That the carrier may refund demurrage collected for the necessary detention of the cars while the sidetrack was being rebuilt. (See note to ruling 242.)

**118. REDUCED RATES FOR MUNICIPAL GOVERNMENTS IN FOREIGN COUNTRIES ADJACENT.**—Upon inquiry: *Held*, That the reduced-rate transportation for municipal

pal governments permitted under section 22 of the act does not apply to municipal governments in foreign countries adjacent

**119. RESHIPPING OF GRAIN.**—Upon inquiry whether a proposed tariff rule providing that “the rate to be applied on all out-bound transit grain of record shall be the specific rate that is lawfully in effect from Chicago at the time the grain is reshipped” may lawfully be incorporated in a tariff: *Held*, That the Commission can not sanction the rule, and that the grain can move only as a through movement on the through rate in effect at the time it starts, or as a local movement. (See *In re Milling-in-Transit Rates*, 17 I. C. C., 113; *Liberty Mills v. L. & N. R. R. Co.*, 23 I. C. C., 184; and *Board of Trade of City of Chicago v. A. A. R. R. Co.*, 39 I. C. C., 651.)

**120. RESPONSIBILITY OF CARRIER FOR FAILURE TO FURNISH PROPER CARS UNDER RATE CONFINED TO CARS OF A CERTAIN CLASS.**—Certain rates on coal published by a carrier to points on a connecting line were expressly limited to shipments “loaded in box or stock cars only,” because the connection refused to handle coal shipments in open cars. Upon demand for cars for a shipment to such points the carrier, instead of furnishing box cars to which the rate applied, furnished coal cars, which carried a higher rate: *Held*, That the carrier having issued the tariff itself, and having furnished cars that did not comply with the tariff requirements, was responsible for the excess charges.

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*November 14, 1908.*

**121. A PRIVATE SIDETRACK DEFINED.**—A private sidetrack is one that is outside the carrier’s right of way, yard, and terminals, and of which the railroad does not own either the rails, ties, roadbed, or right of way. (Modifying ruling 79-a; see note to ruling 242.)

**122. A PRIVATE CAR OWNED BY ONE SHIPPER BUT USED BY ANOTHER.**—A private car owned by one shipper but used with his consent by another shipper dealing in a different commodity is not a private car as that phrase has been defined by the Commission in connection with demurrage charges. (Qualifying ruling 79b; see also ruling 128.)

**123. DEMURRAGE ON PRIVATE CARS TEMPORARILY OUT OF SERVICE STANDING ON CARRIERS' STORAGE TRACKS.**—Demurrage is a charge for detention to cars that have been set by carrier for loading or unloading. Private cars are subject to demurrage rules the same as is the carriers' equipment except when the private car is standing on the private sidetrack. It is not necessary to charge demurrage either on carriers' equipment or private cars when same are temporarily out of service and standing idle upon the storage tracks of the carrier unless provision for such charge is included in carriers' demurrage rules. (See rulings 79, 222, 270, and note to ruling 242; see also Rule 75 of Tariff Circular 18-A; see also Code of National Car Demurrage Rules.)

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*December 7, 1908.*

**124. FREE TRANSPORTATION OF MATERIAL AND WORKMEN.**—A carrier, not being able to obtain ice for refrigeration purposes at a division point, entered into a contract under which a private company there undertook to build a plant and manufacture ice. The contract provided that in case it was necessary to enlarge the plant to meet the increasing needs of the carrier, the carrier would transport free of charge the materials and mechanics necessary to make the enlargement. An enlargement was required and made, and upon application by the carrier for permission to refund the freight charges on the materials used and the passenger fares paid by the mechanics employed on the work: *Held*, That the application must be denied, it appearing that the ice plant also sold ice commercially in the community in question. (Compare ruling 87.)

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*December 8, 1908.*

**125. FAILURE TO VALIDATE PASSENGER TICKET.**—Upon inquiry: *Held*, That a carrier might lawfully incorporate in its tariff a rule providing that when a passenger is compelled to pay the regular return fare because of his failure to have his round-trip ticket validated at the return starting point, the carrier will refund the extra fare upon the filing with it of an affidavit by the holder of the round-trip ticket, certifying that the

ticket had been used in accordance with all the conditions of the tariff and the contract on the ticket except as to the matter of validation. (See ruling 75 and 167.)

**126. REFUND OF OVERCHARGE ON SHIPMENT TO FOREIGN COUNTRY ADJACENT.**—An overcharge was collected on a shipment of tobacco to a point in Mexico. On application of the American carriers, in which the Mexican lines refused to join: *Held*, That the American lines might refund such part of the total overcharge as their division of the through rate bears to the entire through rate.

**127. DAMAGE TO FRUIT BY DELAYED NOTICE OF ARRIVAL AT DESTINATION.**—An express company undertook to notify the consignee of the arrival at destination of a shipment of strawberries, but failed for some days to effect notice partly because of an erroneous address on a postal card: *Held*, That the damage resulting from the delay was not due to any violation of the act to regulate commerce and therefore was not cognizable by the Commission. (See ruling 366.)

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*December 10, 1908.*

**128. INCORPORATION IN TARIFFS OF AMENDED DEFINITION OF A PRIVATE CAR.**—On June 2, 1908, the Commission amended its definition of a private car as used in the opinion *In the Matter of Demurrage Charges on Privately Owned Tank Cars*, 13 I. C. C., 379, to include also cars owned and leased to shippers by private corporations. It is held that this amendment shall be incorporated in all new car-service rules dealing with this subject, and that all rules shall be so amended as to include leased cars on or before the next fiscal year, July, 1909. The Commission rules, however, that upon the amendment of tariffs as indicated, such leased cars, under the conditions dealt with in case No. 933, may be treated as private cars and be exempt from demurrage when standing on private tracks. (See rulings 79b, 122, and 222; see also note to ruling 242.)

*January 4, 1909.*

**129. SIGNATURE TO APPLICATIONS FOR SPECIAL REPARATION.**—In case of the absence, illness, or disability of the executive or general officer of a carrier by whom special reparation applications are customarily made to the Commission, such applications may be signed in the name of such executive or general officer by his chief clerk, provided the executive or general officer has previously filed with the Commission written authority for the chief clerk to append his signature in such cases.

**130. MAINTENANCE OF RELATIVE ADJUSTMENT IN ISSUING TARIFFS TO CONFORM WITH FORMAL ORDER OF THE COMMISSION.**—In establishing rates or regulations under an order of the Commission in a formal case, carrier or carriers that are actually and on the record parties to the case, or that are lawful parties to a joint tariff in which the rate or regulation that is prescribed is published by some carrier that is party to the case, may include in the change or changes made in compliance with the Commission's order commodity or commodities that are grouped with that or those which are specified in the order; and may also include adjustment at other points in order to preserve established grouping or relation of points, and may also include adjustment of rates to same points on other commodities for the purpose of maintaining established relation of rates between commodities. *Provided*, all such changes made by authority of this rule shall be effected by reductions in rates or charges.

If carrier that is not party to the case or to the joint tariff desires to make on less than statutory notice the same changes that are made under the order by carrier that is party to the same, it must secure special permission so to do. (See ruling 14, 200-a, and 396.)

**131. "GROSS TON" AND SIMILAR PHRASES, AS USED IN TARIFFS, DEFINED.**—The term "per ton" and "net ton," when used in tariffs, will, in the absence of qualifying words, be held to mean a ton of 2,000 pounds. The terms "gross ton" and "long ton" and "ton of 2,240 pounds" will be held to mean a ton of 2,240 pounds.

*January 5, 1909.*

**132. REFUND ON GRAIN DOORS.**—Where a carrier has established a tariff provision in conformity with the Commission's rule with respect to the payment by carriers of the cost of grain doors, and it appears that prior to the publication of such a tariff it had been the practice of carrier to pay for grain doors furnished by shippers: *Held*, That applications may be made on the special reparation docket for authority to refund on the basis of the tariff provision for grain doors furnished within six months prior to the effective date of the tariff rule. (See rulings 19, 78, 267, 292, and 360.)

**133. OVERCHARGE ON ONE SHIPMENT OFFSET AGAINST UNDERCHARGE ON ANOTHER.**—(Superseded by ruling 323.)

**134. FREE TRANSPORTATION WHEN TAKING MEASUREMENTS OF EMPLOYEES FOR UNIFORMS.**—A carrier requires that certain of its employees shall wear uniforms made from goods of texture and color and according to specifications prescribed by the carrier. The carrier employs a certain firm to make such uniforms for any and all of its employees at agreed-upon prices. A man is sent over the line to take the measures and orders of employees for such uniforms. The employee generally gives an order on the carrier for the amount of his order, which amount the carrier deducts in whole or in part from wages due the employee and the carrier pays the firm for the uniform.

We are asked if the carrier may lawfully continue granting free transportation to man so taking measures and orders for uniform: *Held*, That having its employees properly uniformed is a duty of the carrier in the interest of the carrier and of its patrons, and therefore the man so sent over its lines for the purpose named is, for that purpose and while engaged in that work, performing a duty devolving upon that carrier and may lawfully be given free transportation to the extent necessary for the performance of that duty, provided he does not in the same connection receive any orders from or sell any goods to persons who are not bona fide employees of that carrier. (See rulings 208b and 346.)

*January 27, 1909.*

**135. DEMURRAGE ON INTERSTATE SHIPMENTS.—**Rule in Supplement No. 2 to Tariff Circular 15-A, entitled "Demurrage on interstate shipments," is amended by adding thereto the following:

It is not permissible to provide that demurrage *may* be refunded or waived in case of inclement weather and leave it to the judgment of some person to determine what constitutes inclement weather. It is permissible to provide that demurrage charges *shall* be waived or refunded in case of weather interference of such severity as to damage the freight in handling it into or from the car, or when shipment is frozen so as to prevent or seriously hinder unloading, or when because of flood or high water, or snowdrifts which it is the carrier's duty to remove, it is impracticable to get car for loading or unloading.

(Amending ruling 223-c. See ruling 358 and see also important note to ruling 242. Rule in Supplement No. 2, referred to, is now reported as Rule 75 of Tariff Circular 18-A. See Code of National Car Demurrage Rules.)

**136. ACCRUED CLAIMS NOT INVALIDATED BY SUBSEQUENT CANCELLATION OF ABSORPTION RULE.—**A tariff providing for the absorption of inbound switching charges on certain traffic also provided that they would not be absorbed when the expense bills therefor were presented more than six months after their date. Within six months after certain switching services had been performed bills therefor were presented, but the carrier refused payment on the ground that during the interval the absorption rule referred to had been canceled: *Held*, That the subsequent cancellation could not invalidate a claim already accrued.

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*February 2, 1909.*

**137. INITIAL CARRIER LIABLE FOR MISROUTING.—**An initial carrier delivered a shipment to a connection, but did not give it any routing instructions beyond noting on the waybill the through rate via the cheaper of two available routes. The connecting carrier sent it over the route yielding it the greater revenue, but carrying the higher through rate: *Held*,

That the initial carrier is liable for the misrouting. (Construed and amended by ruling 286c. See ruling 199.)

**138. CHARGES FOR MOVING PRIVATE CAR.**—A tariff provided for the movement of a private car or sleeper at the regular fare for each occupant with a minimum of 20 adult fares and a minimum collection of \$25 for each movement. Its direct line being blockaded by a washout, a carrier sent individual passengers around a longer route over its lines at the short-line fare, but charged the occupants of such private car then on its lines the full mileage rates for the longer haul: *Held*, That under the tariff rule the car and party should have moved as the individual passengers were moved under the same circumstances; and the short-line fare ought also to have been applied to the private car and party. (See ruling 213.)

**139. STATUTE OF LIMITATION.**—(Construed and amended by Ruling 286 a, b.)

**140. MISROUTING SHIPMENT THAT COULD MOVE INTRASTATE.**—A shipment destined to another point in the same state was delivered to a carrier without routing instructions. It was sent by a route which took it outside the state lines, and required the payment of an interstate rate higher than the state rate which would have applied on an available intrastate route: *Held*, That the Commission recognizes the right of the shipper to route his shipment, which in this instance the shipper neglected to do; that the shipment moved interstate, and that the Commission can not say that the interstate line can apply any other than its lawfully published tariff rate except under special permission or order of the commission. (See rulings 214 and 419.)

**141. TARIFF IS NOT GOVERNED BY CLASSIFICATION EXCEPT WHEN SO SPECIFIED.**—A tariff naming commodity rates on strawberries in carloads fixed a certain rate on a minimum of 100 crates, and a lower rate on a minimum of 200 crates. The classification in that territory provided that carload rates would apply only when the carload is shipped from one station in one day by one shipper to one consignee and destination. The shipments in question belonged to different

owners, but with the knowledge and consent of the carrier and under the admitted intent of the tariff, were loaded and forwarded as carload shipments. They were loaded to or beyond the minimum of 200 crates per car: *Held*, That they were entitled to the application of the lower rate on the basis of the 200-crate minimum.

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*February 8, 1909.*

**142. BUNCHING CARS IN TRANSIT.**—Upon an informal complaint that cars were delayed in transit and delivered by a carrier in such number as to exceed the shipper's facilities for unloading within the free time: *Held*, That tariffs ought to contain a rule providing that when, by fault of the carrier, cars are bunched in excess of the shipper's or consignee's ability to handle them within the free time, demurrage will not accrue. In the absence of such a rule the Commission can determine the reasonableness of such a practice only upon complaint filed. (See note to ruling 242; also Code of National Car Demurrage Rules.)

**143. MISROUTING OF COMPANY MATERIAL.**—The initial carrier, disregarding instructions to route a shipment through a particular junction, moved it to destination over its own lines, the rates over the two routes being the same. Although the shipment was consigned to a private person, it was in fact the property of the connecting line, which therefore could have hauled it free of charge from the junction point to destination. Notwithstanding the fact that the initial carrier had no notice and was not chargeable with notice that it was company material: *Held*, That the initial line is liable for the additional charges on the ground that a carrier exercising the right, under Rule 70 of Tariff Circular 15-A, to dictate intermediate routing must make its election at the time it accepts the shipment, and that if the carrier accepts the shipment with specific instructions it must so move the traffic or bear the damages arising out of its departure from the instructions. (Rule 70 is reported as ruling 214 of this Bulletin. See *Fullerton-Powell Hardwood Lumber Co. v. M. & N. F. R. R. Co.*, U. R. Op. A-367; *St. Louis Southwestern Ry. Co. v. P. & R. Ry. Co.*, U. R. Op. A-783; and *In*

*the Matter of Transportation of Company Material*, 22 I. C. C., 439.)

**144. SWITCHING SHIPMENTS UPON WHICH TRANSPORTATION CHARGES HAVE NOT BEEN PAID.**—A shipment was forwarded with instructions to give delivery on a certain road. The car moved over the proper route to destination, and was tendered for switching to the road indicated in delivery directions. Under long-established custom, it declined to assume responsibility for charges on the shipment and refused to accept the car until transportation charges had been paid. The carrier that brought the car in mailed a notice to the address of consignee, who was not known, and before the difficulty was straightened out demurrage accrued: *Held*, That the demurrage charges lawfully accrued and should stand.

**145. A TARIFF RULE THAT IS UNLAWFUL *PER SE* CAN NOT BE USED.**—A tariff contained a rule providing that:

When freight can not be disposed of at point held for sufficient amount to realize by sale both freight and car service, or storage charges, demurrage charges may be refunded, waived, or canceled.

*Held*, That the performance of a transportation service determines the obligation of the carrier to collect and of the shipper to pay the published rates therefor and no subsequent fact, having no relation to the service, can lawfully be made the basis for a refund or other departure from such rates. The provision is therefore unlawful *per se* and can not be accepted as authority for a waiver, refund, or cancellation of the tariff charges even as to a shipment made while the provision was contained in the published tariff. (See note to ruling 242; compare ruling 41; also see ruling 114.)

**146. IMPROPER AND UNLAWFUL TARIFF PROVISION.**—A carrier's tariff contained the following rule:

The ——— Railway reserves the right to route through to destination property delivered to it for transportation at the through rates shown in this tariff; and every carrier participating in such transportation shall have the right, in cases of necessity, including floods, embargoes, and blockades, to forward said property by any carrier between the point of shipment and the point to which the rate is given. All additional risks

and increased expense incurred by reason of change in route in cases of necessity, including floods, embargoes, and blockades, shall be borne by the owner of the goods and be a lien thereon

*Held*, That this rule is improper and unlawful. (Compare ruling 183; see also ruling 83.)

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*February 9, 1909.*

**147. RATE MUST APPLY ACCORDING TO MOVEMENT.**—Upon the arrival of a shipment at the junction designated in the consignor's routing instructions it appeared that, because of a washout on its lines, the connecting carrier could not accept the movement. The shipper thereupon assumed custody of the shipment and forwarded it by a water line: *Held*, That the carrier must collect its local rate to the junction point and can not apply its proportion of the through rate. (See ruling 83.)

**148. SIDE TRIPS MUST BE SHOWN IN THROUGH TARIFFS.**—(Restated in ruling 177.)

**149. AMENDED RULE 14 OF THE RULES OF PRACTICE.**—(See current Rules of Practice.)

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*February 11, 1909.*

**150. CARETAKERS UNDER SECTION 22 OF THE ACT.**  
—Section 22 of the act provides—

That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, state, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation.

*Held*, That the words "and necessary agents employed in such transportation" modify the entire preceding part of the section, and that the necessary caretakers of property transported for the United States, state, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, may legally be carried free or at reduced rates by carriers subject to the act, as well as the caretakers of desti-

tute and homeless persons transported by charitable societies. The words "necessary agents" as used in this section are interpreted to mean those persons necessary to the safe and proper care of the property during the period of transportation, and may not properly be extended to cover any persons other than those who actually accompany such property and are actually necessary to its care. (Compare ruling 171.)

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*March 1, 1909.*

**151. RELIEF OF AGENT DOES NOT RELIEVE CARRIER.**—Through error an agent inserted a route in a round-trip ticket over which the published fare was \$10 in excess of the amount actually collected from the passenger. Upon the request of the carrier for permission to relieve its agent of the uncollected undercharge: *Held*, That the collection of the amount from the agent would not in any way relieve the carrier of its responsibility for failing to collect the full tariff fare from the passenger. (See *L. & N. R. R. v. Maxwell*, 237 U. S., 94.)

**152. RIGHT OF SHIPPER TO PAY FREIGHT CHARGES ON FICTITIOUS WEIGHT IN ORDER TO RECEIVE FREE ICING.**—A consignor having a shipment of dressed poultry weighing 9,910 pounds offered to pay freight charges on the basis of 10,000 pound in order to have the advantage of free icing under a tariff rule providing that the cost of icing would not be assumed by the carrier when the weight in each car was less than 10,000 pounds; but the carrier refused to accept the 77 cents additional freight charges and compelled the shipper to pay \$5.25 for the icing: *Held*, In analogy to the common practice of carriers to apply the carload rate and minimum on shipments of less weight where the application of the less-than-carload rate would result in higher charges, that such a tariff rule, if susceptible of the construction placed upon it by the carrier, is unreasonable and ought to be amended.

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*April 5, 1909.*

**153. CARRIER WHEN A SHIPPER CAN NOT EVADE PAYMENT OF LAWFUL RATES OF A CONNECTION BY SECURING TRACKAGE RIGHTS OVER ITS LINE.**—An in-

terstate carrier desiring stone for ballast on its right of way, leased a trackage right over a short connecting line leading to a quarry, and proposed to purchase the stone at the quarry and haul it to its own line with its own crews and equipment: *Held*, That the Commission must decline to sanction the arrangement for the reason that the carrier under the circumstances is a shipper and the proposed arrangement is a mere device to evade the payment of the lawful rates and would result in unlawful discrimination. (See rulings 225, and 439; also see rulings indexed under Company Material and Divisions.)

**154. TICKETS PURCHASED AT THE REGULAR PUBLISHED FARE MAY BE GIVEN BY A LAND COMPANY TO PROSPECTIVE PURCHASERS.**—A land company having no relations, direct or indirect with a carrier has a lawful right to pay all or any part of the carrier's lawful transportation charges for such persons as it may choose to supply with tickets.

**155. MOVEMENT BETWEEN PORTS IN CONNECTION WITH RAIL HAULS TO AND FROM INLAND POINTS SUBJECT TO THE ACT.**—Traffic moving by rail from an inland point to a port and thence by water to another port, or moving by water from one port to another port and from the latter port to an inland point by rail, and which does not pass into the possession or custody of the owner or his agent at the port, is, when interstate traffic, subject to the act and under the jurisdiction of the Commission. (See rulings 66, 201, 354, 401, and 422.)

**156. DELIVERING CARRIERS MUST COLLECT LAWFUL CHARGES UPON PREPAID SHIPMENTS.**—Upon inquiry: *Held*, That it is the duty of the delivering carrier to collect the lawful rates on prepaid shipments and to correct any errors that may have been made by the agents of the initial carrier in billing or in the collection by the initial carrier of the prepaid charges. (Reaffirming ruling 16; see ruling 314; also *Western Classification Case*, 25 I. C. C., 475.)

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*April 6, 1909.*

**157. FREE TRANSPORTATION FOR OFFICERS AND AGENTS OF EXPRESS COMPANIES AND THEIR FAM-**

**ILIES.**—Upon inquiry it was *Held*, That a carrier subject to the act may lawfully give free or reduced rate transportation to the officers and agents, and their families, of express companies that are subject to the act. The Commission's decision in formal case No. 1985. (*In re Contracts for free Transportation*, 16 I. C. C., 246, is not to be understood as contradicting or rescinding this ruling. See ruling 361; also ruling 513.)

**158. FREE TRANSPORTATION TO FAMILIES OF EX-EMPLOYEES.**—Free transportation may lawfully be accorded to members of the family accompanying an ex-employee traveling for the purpose of entering the service of any common carrier subject to the act. (See ruling 102.)

**159. BILL OF LADING SPECIFYING A ROUTE, BUT NAMING A RATE APPLICABLE OVER ANOTHER ROUTE.**—(Canceled by ruling 474.)

**160. HIGHER RATES WHEN SHIPMENTS ARE TENDERED WITH OTHER THAN UNIFORM BILL OF LADING.**—A carrier's tariff provided higher rates on shipments not tendered with a uniform bill of lading: *Held*, That the tender of a shipment accompanied by other than a uniform bill of lading may not be taken by the carrier as evidence of the shipper's election to use the higher rate. The carrier must direct his attention to the fact that a lower rate is available under the uniform bill of lading. (Compare ruling 226.)

**161. TELEPHONE AND TELEGRAPH LINEMEN NOT ENTITLED TO FREE TRANSPORTATION.**—(Telegraph and telephone companies are brought within the law by the amendatory act of June 18, 1910; see antipass provisions of section one. Also see ruling 305, 95a par. 2, 219, and 364.)

**162. MUNICIPAL FERRIES SUBJECT TO THE ACT WHEN PARTICIPATING IN TRANSPORTATION DEFINED BY THE STATUTE.**—The city of New York operates a municipal ferry between St. George and the foot of Whitehall street. The Staten Island Transit Company sells commutation tickets from Perth Amboy to the Whitehall street pier, and files a tariff of local and joint passenger fares to cover such trans-

portation. Upon inquiry from the commissioner of docks: *Held*, That the municipality must join in the tariffs. (Compare ruling 89.)

**163. REFUND ON ACCOUNT OF FULL-FARE TRANSPORTATION USED BY A BOY UNDER 12 YEARS OF AGE NOT PERMISSIBLE.**—A purchaser of two full-fare tickets called upon the initial carrier for a refund, after they had been used, on the ground that he had asked for a ticket and a half, and that he had used one of the full-fare tickets for his son, who was under 12 years of age. The agent of the carrier denied that a half-fare ticket had been requested, and the fact appeared that the father had accepted and paid for two full fares: *Held*, That the Commission would not authorize a refund.

**164. A CARRIER MUST PUBLISH FARES AND OFFER TO THE PUBLIC RAILROAD TICKETS INDEPENDENT OF OMNIBUS ARRANGEMENTS.**—A carrier under a tariff provision sells excursion tickets to a point on its line to which is attached a coupon for carriage from that point to Luray Caverns and return on the omnibuses of a designated transfer company *Held*, That this is not a discrimination under the act against another transfer company. But the Commission holds that while such tickets may lawfully be sold, the carrier must publish the railroad fare to the point in question and separately show bus fare beyond, and must also have on sale tickets to that point at the rate named without bus coupons attached.

**165. OFFICERS AND EMPLOYEES OF A RAILROAD RECEIVER ENTITLED TO FREE TRANSPORTATION.**—Upon inquiry from a receiver duly appointed by the court to manage the property and assets of a railroad company: *Held*. That officers and employees engaged under the receiver in the operation of the railroad occupy the same position under the antipass provision of the act as do the officers and employees of any other railroad. (See ruling 436.)

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*April 13, 1909.*

**166. RETROACTIVE APPLICATION OF RECONSIGNING PRIVILEGE NOT PERMISSIBLE.**—Adhering to *Conference*

*ruling 6*, the Commission will not sanction the application, retroactively, of a reconsigning privilege, even though it had long been the custom of the carrier to permit reconsignment without tariff authority. (See *ruling 77*.)

**167. A PASSENGER WRONGFULLY DEPRIVED OF THE BENEFIT OF RETURN COUPON OF A ROUND-TRIP EXCURSION TICKET MAY HAVE REPARATION.**—A passenger holding a round-trip ticket on the certificate plan, or a round-trip ticket requiring validation, was, through ignorance or fault of a carrier's agent, deprived of the benefit of the reduced fare on the return journey and was compelled to purchase a full-fare ticket: *Held*, That such cases are analogous to the misrouting of freight and ought to be adjusted on the general principle underlying Rule 70 of Tariff Circular 15-A (*ruling 214* of this bulletin). The Commission, therefore, authorizes carriers in such cases, without a special permissive order, to refund to the passenger the difference between the total fare paid by him and the reduced rate which he would have enjoyed except for the carrier's error; and the carrier at fault must bear the full burden without recourse upon any other road participating in the carriage. (Reaffirming *ruling 113*. See also *rulings 75, 125, 247, 266, and 277*. Also see *L. & N. R. R. v. Maxwell*, 237 U. S. 94.)

**168. EFFECT OF TRACKAGE ARRANGEMENTS UNDER THE ACT TO REGULATE COMMERCE WITH RESPECT TO SHIPMENTS ROUTED BY SHIPPER.**—The Mineral Point & Northern Railway Company has trackage arrangements with the Chicago, Milwaukee & St. Paul for the joint use of the latter's tracks between Highland Junction and Mineral Point, Wis. Upon inquiry from the general manager of the first-named road as to whether the St. Paul rightfully may refuse to turn shipments over to it at Highland Junction, when so routed, and retain possession of the revenue for the haul from that station to Mineral Point: *Held*, On the understanding that the shipments in either case would be delivered at the same warehouse and at the same rate, that under the act to regulate commerce no obligation rests on the Chicago, Milwaukee & St. Paul to turn over shipments to the Mineral Point &

Northern Railway at Highland Junction for transportation to Mineral Point.

**169. FREE PASSES TO EMPLOYEES OF A CAR-LIGHTING COMPANY UNLAWFUL.**—Upon inquiry from a car-lighting company it was *Held*, That its experts for the testing and observation of the performance of its lights on trains are not employees of the carrier, and are not therefore entitled to free transportation. (See ruling 95.)

**170. IMPORTED MERCHANDISE NOT ENTITLED TO INLAND PROPORTIONAL RATE WHEN THE TRANSPORTATION FROM THE PORTS IS PURELY LOCAL.**—An importer of flax, after unloading a cargo at the port, sold it, and the purchaser some months later sold a part of the original shipment to a manufacturing company, by which it was shipped to a point in the Middle West at the regular local rate of the carrier that took the movement. At the time there was in effect an inland proportional rate from the port to destination: *Held*, That the movement from the port was a separate and distinct transaction upon which the local rate was the only lawfully applicable rate.

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*May 4, 1909.*

**171. FREE TRANSPORTATION TO SHIPPERS OF PERISHABLE FREIGHT.**—The tariffs of a carrier included a refrigeration service, under rates named therein, on perishable freight. Upon inquiry whether the shippers or their agents might have free transportation to inspect the reicing of the cars: *Held*, That it does not appear that they are necessary care takers within the meaning of section 1 of the act. (Compare ruling 150.)

**172. RATE IN EFFECT ON RECEIPT OF SHIPMENT IS THE LAWFUL RATE.**—Freight was received by a carrier and bills of lading were issued therefore on December 21 and 29, 1908. The freight was actually moved on January 1, 1909, on which date a lower rate went into effect: *Held*, That the rate in effect on the date the carrier received the property for transportation is the lawful rate.

**173. FREE TRANSPORTATION FOR FAMILY OF DECEASED EMPLOYEE.**—An engineer of one carrier having ended his run for the day was preparing to return to his home over another line the train service of which was more convenient. He lost his life by inadvertently stepping in front of a train of this carrier. Upon inquiry whether under the recent amendment to the antipass provision of section 1 free transportation might be given to his widow and children by the road by which he had been employed: *Held*, That the case comes within the spirit and meaning of the amendment. (The amendment referred to is in the act of April 13, 1908. See rulings 18, 103, 193, and 476.)

**174. FREE TRANSPORTATION OF FAMILY OF EMPLOYEE.**—May an employee use free transportation for the remains of his wife after they had been temporarily interred? *Held*, That within the meaning of section 1 of the act the deceased wife of an employee may be regarded as a member of his family until given permanent burial. (See ruling 95c.)

**175. CARLOAD SHIPMENTS.**—A coffee broker purchased from three different merchants at New York three lots of coffee for shipment to one customer as one carload. The three lots were delivered to the carrier under circumstances that would have entitled them to go to destination as a carload shipment had proper instructions been given. Because of the failure of the shipper's agent to give such instructions the three lots went forward to destination as three shipments, at the less-than-carload rate. Upon inquiry by the carrier whether it might assess the carload rate: *Held*, That freight charges must be collected on the basis of the less-than-carload rate.

**176. FREE OR REDUCED-RATE TRANSPORTION TO AND FROM EXHIBITIONS.**—Specimens of ore that are not to be offered for sale but are intended exclusively for exhibition at the Chamber of Mines at Los Angeles may be carried free of charge or at reduced rates, under section 22 of the act.

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*May 10, 1909.*

**177. SIDE TRIPS NOT SPECIFICALLY SHOWN IN A THROUGH TARIFF.**—Modifying Conference Ruling No. 148,

it is *Held*, That a note in a through tariff providing that passengers purchasing through tickets thereunder shall be entitled to such side-trip privileges as are stated in the individual tariffs on file with the Commission, of the carriers, that are parties to the through fares, is a sufficient compliance with the requirements of the law and with the rules of the Commission.

**178. USE OF MILEAGE TICKETS IN NEW TERRITORY.**—A tariff authorizes the sale of mileage tickets good between points within a specified limited territory. Subsequent to the date upon which such a ticket is sold and prior to the date of its expiration the tariff is amended so as to include additional territory. May such mileage tickets be thereafter honored for transportation between points in the added territory? *Held*, That the terms of the contract of original sale must be adhered to unless the amendment to the tariff specifically authorizes honoring outstanding tickets between points in the added territory.

**179. TARIFFS PROVIDING FOR TRANSPORTATION OF CARETAKERS IN PASSENGER CARS.**—When an express company provides in its tariff for free transportation for caretakers in charge of live stock, poultry, or fruit, and the railroad company over whose lines such express company operates provides in its tariff that such caretakers may be permitted to ride in passenger cars, the tariff of the express company and that of the railroad company must give reference to each other.

**180. LESSEE ROAD NOT SERVING PUBLIC AS COMMON CARRIER.**—For operating purposes only a carrier leased 20 miles of its line to another railroad company. The contract required the lessee, for an agreed compensation to be paid to it by the lessor, to operate the lessor's trains and to maintain its way, tracks, and appurtenances, the rates and charges to be collected by the lessor and the lessee to have no direct dealings with the public. On the facts as stated in the inquiry: *Held*, That the lessor must publish the rates, fares, and charges, and the lessee need not be a party to the tariffs nor concur therein, but is simply a contractor performing certain services for the lessor. (Compare ruling 229.)

June 7, 1909.

**181. SUBSTITUTION OF TONNAGE.**—(Withdrawn February 10, 1913; see *The Transit Case*, 26 I. C. C., 204, 210.)

**182. SALE OF TICKETS AFTER DEPARTURE OF LAST TRAIN ON FINAL SELLING DATE.**—Tariff quoting passenger fares provides that tickets shall be on sale between certain specified dates and that they shall be good going for a specified period, including the date of sale. Passenger desiring to take advantage of such fare applied for such ticket on the last day of sale and after the last train for the day had departed from that station. Agent refused to issue the ticket desired. The time limit specified in the tariff was sufficient to carry passenger through to destination within that limit even if he left the initial point on the day following the last date of sale. Tariff did not require that journey should commence on date of sale of ticket: *Held*, That agent should have issued the ticket requested, the time limit thereunder being sufficient to carry passenger through to destination by his starting on the following day, and the tariff containing no requirement as to date upon which journey should begin: *Held further*, That if tariff had provided that journey must commence on the day of sale of ticket, agent could not legally have issued such ticket after the last train for the day had departed on the last date of sale.

**183. RESERVATION OF RIGHT TO ROUTE SHIPMENTS.**—The following rule in a published tariff was approved as lawful, subject to complaint by shippers:

The A. & B. Railroad Company reserves the right to route through to destination property delivered to it for transportation at the through rates shown in this tariff, and every carrier participating in such transportation shall have the right, in cases of necessity, to forward said property by any railroad or route between the point of shipment and the point of destination, or the point to which the rate is given; if such diversion shall be from a rail to a water route, the liability of the carrier shall be the same as though the entire carriage were by rail. (Compare ruling 146.)

(See section 15 of the amended act reserving to shippers the right to route shipments.)

**184. PERFORMANCE OF TRANSPORTATION SERVICE WITHOUT RATES ON FILE.**—In a recent prosecution instituted by the Commission of a carrier for engaging in transportation of interstate commerce without having previously filed with the Interstate Commerce Commission lawful tariffs applicable thereto, and in which conviction was had and fine of \$12,000 was assessed, the court, speaking through Humphrey, J., said:

It thus appears not only that the performance of interstate transportation by a carrier which has neglected to file and publish its rates and charges is a misdemeanor under the act to regulate commerce and under the Elkins Act, punishable by as severe penalties as any other violation of these acts, but it also appears that the requirement for filing and publication of the rates has been in the act to regulate commerce ever since the passage of the original Cullom bill, and that its importance has been recognized by the Congress by successive amendments designed to make it more precise and its violation more surely and more severely punishable.

The railroad line of the defendant here is entirely situated within the state of Illinois. It is not more than 16 miles in length. It is really no more than a switching road connecting the various railways reaching East St. Louis and Alton, Ill., with each other and with various industries which have been established upon its rails. From the indictment and the plea thereto it appears, however, that this defendant is engaged in the transportation of property moving wholly by railroad from one state to another state. It is, therefore, as much subject to the act as though is owned and operated all the line of railroad connecting the points in different states between which moved the commodities mentioned in the indictment. *C. N. O. & T. P. Ry. v. I. C. C.*, 162 U. S. 184; *L. & N. R. R. v. Behlmer*, 175 U. S. 648; *U. S. v. C. & N. W. R. Co.* (C. C. A., 157 Fed. Rep, 321; *Belt Ry. Co. of Chicago v. United State*, 168 Fed. Rep., 542.

These authorities establish that the law regarding publication of rates and charges for interstate transportation applies with equal force to all carriers engaging in such interstate transportation, whether such carriers operate trains from one state to another or operate entirely within the boundaries of a single state.

The chief object of the act to regulate commerce is the prevention of discrimination. Carriers, being engaged in a public employment, must serve all members of the public on equal terms. This was the doctrine of the common law. It has been explicitly stated and strengthened by the successive acts to regulate commerce. The requirement of the act that all rates should be published is perhaps the chief feature of the scheme provided for the effective outlawing of all discriminations. If this portion of the act is not strictly enforced, the entire basis of effective regulation will be lost. Secret rates will inevitably become discriminating rates. Whenever discriminating rates or practices are made public, a thousand forces of self-interest and of public policy will be set at work to reduce them to fairness and equality. The failure of any carrier to properly file and publish its rates is quite as serious a violation of the act to regulate commerce as a failure to observe such rates after they have been properly filed and published. (*U. S. v. Illinois Terminal R. C.*, 168 Fed. Rep., 546, 548.)

It is clearly the duty of the Commission to strictly enforce the provision of the law referred to, and it may confidently be expected that that duty will be performed. (See ruling 194.)

**185. FREE OR REDUCED RATE TRANSPORTATION TO MUSEUM OF NATURAL HISTORY.**—A museum of natural history, erected in a public park by private subscription and supported partly by taxes and partly by the income of funds contributed by citizens, may be given free or reduced rate transportation under section 22 of the act on articles intended for exhibition therein, notwithstanding the fact that as a means of securing additional income it charges an admission fee on certain days of the week, admission being free on other days. (See ruling 245.)

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*June 8, 1909.*

**186. LIABILITY FOR MISROUTING.**—(Canceled by ruling 474c.)

**187. INTERPRETATION OF CONFERENCE RULING NO. 3.**—(Restated in ruling 314.)

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*June 14, 1909.*

**188. RATES BASED ON DECLARED VALUATION.**—The agent of a shipper not knowing the value of a dog to be sent by

express, nevertheless named a valuation of \$500, and the resulting charges to destination amounted to \$45. The dog was actually worth \$15, and at this valuation the express charges would have been \$8. The consignee declined to accept delivery and pay the charges demanded. Upon inquiry whether charges may be collected on the basis of the actual value of the dog, it was *Held*, That the shipper is responsible for the act of his and that the charges at the valuation given must be collected. (Compore rulings 58 and 295.)

**189. RETURN OF CARETAKERS.**—A shipment of live stock moved between two points over two connecting lines. Upon inquiry by the delivering road, which had a through direct line between the two points, it was *Held*, That it can not free of charge return the caretakers over its own direct line through to the point of origin of the shipment.

**190. IN THE ABSENCE OF INSTRUCTIONS INITIAL CARRIER NOT REQUIRED TO ROUTE VIA RAIL AND WATER.**—Rule 70 of Tariff Circular No. 15-A (*Conference Ruling* 214) contemplates that where rail-and-water and all-rail rates are available for a shipment the shipper shall designate which class of routing he desires and that the agent of the carrier shall secure such designation from the shipper.

A shipment was delivered to a rail carrier destined to a point to which it might be forwarded via either all-rail or rail-lake-and-rail route. No class of route was designated by the shipper. Shipment was forwarded all rail: *Held*, That taking into consideration the liabilities of carriers and the question of marine insurance upon water-borne traffic, the carrier's agent did not negligently misroute this shipment. (Interpreted in ruling 316. See *Keeton v. St. L. S. W. Ry. Co. of Texas*, 39 I. C. C., 221.)

**191. CAR-SERVICE CHARGES ON TRAFFIC FROM AND TO CANADA.**—With respect to traffic between points in Canada and points in the United States, the Commission does not waive the requirement that carriers shall file tariffs showing their terminal charges and that such charges must either appear specifically in the tariffs naming the rates or the tariffs establishing such charges must be specifically referred to in the tariffs naming the rates.

**192. INTERPRETATION OR AMENDED RULE 70 OF TARIFF CIRCULAR 15-A.**—(Canceled by ruling 474.)

**193. FREE TRANSPORTATION OF REMAINS OF DECEASED EMPLOYEE AND FAMILY ACCOMPANYING SAME.**—It is the view of the Commission that the spirit and meaning of the law with relation to free passes for employees and their families will not be violated if, in the case of the death of an employee while in the service of a carrier, free transportation be given to his remains and to members of his family who might lawfully use free transportation, if he were still alive, to the place of interment and return to their homes. (See rulings 18, 103, 173, and 476.)

Note.—The amendatory act of June 18, 1910, authorizes free transportation to widows and minor children of deceased employees, the former during widowhood and the latter during minority.

**194. REFUND DENIED OF DEMURRAGE COLLECTED UNDER TARIFF NOT ON FILE.**—The Commission will not entertain with favor claims for refund of demurrage charges, collected in accordance with a carrier's established practice, solely upon the ground that the demurrage tariffs were not on file with the Commission at the time the demurrage charges accrued. The failure to file demurrage tariffs constitutes a violation of the act, with which the Commission will deal through the Division of Prosecutions. (See ruling 184.)

**195. APPLICATION OF COMBINATION RATES ON FREIGHT MOVING THROUGH ANOTHER JUNCTION.**—The conference ruling of June 14, 1909, under this caption was rescinded on November 24, 1909. Amended Rule 5, Tariff Circular No. 18-A, covers and governs the subject.

**196. INTERCHANGE OF FREE TRANSPORTATION FOR EMPLOYEES OF WATER LINES.**—When a common carrier by water, other than ocean carrier not subject to the act, unites with a carrier by rail for the interstate transportation of passengers, partly by water and partly by rail, under a common control, management, or arrangement for a continuous carriage shown by concurrence in tariff or tariffs duly published and filed with the Commission, such carriers can lawfully interchange transportation for their officers, agents, and employees. (Reaffirming ruling 95g. Modified by ruling 475.)

*June 21, 1909.*

**197. CARRIERS SUBJECT TO THE ACT.**—A railroad not otherwise subject to the act subjects itself to the jurisdiction of the Commission and the provisions of the act if it transports express matter for an express company that is subject to the act. (See rulings 368 and 418.)

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*June 22, 1909.*

**198. INTERPRETATION OF RULE 70, TARIFF CIRCULAR NO. 15-A (Ruling 214 of this Bulletin).**—Under this rule any carrier, whether it be the initial or a connecting line, that misroutes a shipment, thereby causing additional transportation charges, may, upon admitting its error, pay the damages arising therefrom, provided the whole burden is borne by it without participation therein by its connections. But the admission must be in good faith with respect to the particular case of misrouting; the Commission will not recognize the validity of any general agreement between two or more carriers by which one assumes responsibility for misrouting in all cases.

**199. RESPONSIBILITY FOR MISROUTING.**—When a shipper has given routing instructions which a carrier fails to transmit to its connection, the carrier so failing shall be responsible for all additional transportation charges resulting from a misrouting of the shipment. (Amended by ruling 286-c. See ruling 137.)

**200. REPARATION CLAIMS ON THE INFORMAL DOCKET.**—(a) At a recent conference between the Commission and representatives of a number of carriers the embarrassments arising through the tying up of rate schedules under the one-year clause customarily inserted in informal reparation orders were fully considered, and the discussion that then took place as well as our subsequent reflection upon the matter have led us to the conclusion that some modifications of our practice in that regard may be made in certain cases to advantage and without impairing the effectiveness of the law. We have therefore agreed upon the following rules which we think will afford some relief in the premises. (See rulings 14, and 396.)

1. In cases where the through rate in effect at the time of the shipment was in excess of the sum of the local rates the order, instead of requiring the maintenance of an absolute rate for one year from the date of the filing of the application, shall require the absolute rate to be maintained for a period of only six months from the date upon which the reduced through rate equaling the sum of the locals became effective; this rule shall apply, however, only in cases where the local rates in question are to and from some well-recognized and established basing point or line, such as the Mississippi, Missouri, and Ohio Rivers, Chicago, Minnesota Transfer, Buffalo, etc. In all other cases the present practice shall be enforced. (Modified by ruling 425.)

2. Where there is a natural geographical relation between the point involved and other points, which relation the carrier has theretofore expressed in its tariffs by grouping that point with the other points, either with respect to rates on the commodity in question, or with respect to rates on other commodities, or with respect to class rates, the order may require the maintenance of the group relation for one year from the date of the application instead of requiring an absolute rate to or from the point in question.

3. Where the rates on a product of a raw material have had a definite relation to the rates on the raw material, and that relation has been temporarily disturbed and subsequently restored, the order may control the relation for one year instead of fixing an absolute rate on the product.

4. Where a carrier is compelled to charge a higher rate than was intended because of an error in printing a tariff, the one-year clause may be omitted only where the error is specifically called to the attention of the Commission within ninety days after the tariff containing the error has been filed.

(b) Because of the uncertain condition of the tariffs of carriers the Commission has been rather liberal in the past in the conduct of its special reparation docket and proposes, in order to help carriers dispose of claims that have accumulated in the past, to continue this policy for the present. It is manifest, however, that the time is approaching when in the general interest of all concerned the Commission must adopt a different attitude. We take occasion therefore now to say that the Commission will

cooperate with carriers, so far as that may legally be possible, in the effort to get all old claims disposed of, and, with respect to shipments made prior to September 1 next, will pursue its present policy of liberality. But with respect to shipments moving on and after that date the Commission will draw the lines much more closely, and will adopt such measures as will materially narrow the scope of its activities in that connection. We are not prepared at this time to define in detail what our policy in the future will be. It may be well, however, now to say that after that date we shall not award reparation, either on the formal or the special docket, in any case where the carrier in question has reduced a rate simply in order to meet the lower rate of a competitor. Any other course of action not only deprives the competitor of the natural benefits of its lower rate, but tends to destroy the inducements for making a lower rate. Moreover, any other course of action is demoralizing in that it enables the carrier, before its own lower rate has become effective, to assure shippers that they may ship by its line notwithstanding its higher rate and afterwards secure reparation on the basis of the lower rate of its competitor. Where there is a difference in rates between two points over different lines, shippers must understand that they may get the benefit of the lower rate only by sending their merchandise over the line publishing the lower rate. (See ruling 205; also; *Noble v. D., T. & I. Ry. Co.*, U. R. Op. A-510; *Trussed Concrete Steel Co. v. E. R. R. Co.*, U. R. Op. A-512 and A-513; *Athens Pottery Co. v. T. & N. O. R. R. Co.*, U. R. Op. A-796; *Isbell & Co. v. L. S. & M. S. Ry. Co.*, 19 I. C. C., 450; *Georgia-Carolina Brick. Co. v. S. Ry. Co.*, 20 I. C. C., 149; *Railroad Commissioners of Montana v. N. P. Ry. Co.*, 26 I. C. C., 482; and *Puyallup & Summer Fruit Grower's Asso. N. P. Ry. Co.*, 38 I. C. C., 702.)

(c) It may be well also to announce that it has been suggested that when reparation is granted to a complainant, either in a formal or an informal proceeding, on a finding that the rate under which his shipment moved was excessive and therefore unlawful, the spirit of the law requires that the order ought also to compel the carrier to make a refund on the same basis on all other shipments, moving after the date of the filing of any such complaint, under the rate thus condemned. While no conclusion

has been reached there is force in this view and it will have further consideration. (See ruling 220-*d*.)

(d) The suggestions that have come to us from various quarters in relation to the conduct of the special reparation docket indicate that some misapprehension exists as to the purpose of that docket, and as to the authority of the Commission in dealing with such cases. It may be well, therefore, to say that our action in special reparation cases has no authority in law except the authority upon which we take similar action in formal cases. In all cases, whether on the formal or the special docket, the law in section 15 specifically requires a complaint and answer and a full hearing; and in section 14 it is provided that where damages are awarded the report of the Commission shall include the findings of fact on which the award is made. We have endeavored to simplify the procedure on the special docket by accepting the application of the carrier as the equivalent of a complaint and answer, and by accepting its admission that the rate charged under the circumstances then existing was unreasonable as a sufficient compliance with the requirements of section 15 for a full hearing. The informality in the pleadings in such cases seems to have led some carriers as well as shippers into the error of supposing that special reparation cases can be disposed of still more informally. This, however, is a mistaken view of our authority. The special docket is not an informal docket in any sense except in respect to the form of the pleadings and the character of the hearing. Our orders in such cases must be regarded as formal orders as fully in all respects as our orders in formal cases. The Commission can exercise no authority on the informal docket that it can not exercise on the formal docket, nor may it omit any requirement with respect to cases on the special docket that the law imposes upon us in the disposition of cases on the formal docket. (See ruling 14 and 220.)

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*June 23, 1909.*

**201. JOINT THROUGH RATES TO AND FROM PORTO-RICAN PORTS.**—Without at this time deciding whether Porto Rico is to be regarded as a territory of the United States as that phrase is used in section 1 of the act, the Commission will

recognize the validity of joint through rates from or to points in the United States or to or from a port or ports in Porto Rico when properly concurred in by the water carriers. (See rulings 155, 354, 401, and 422.)

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*June 24, 1909.*

**202. DISTANCE TARIFFS TO SHOW DISTANCE BETWEEN STATIONS.**—Where rates are stated in a tariff as so much per mile, or according to distance, that tariff, or some tariff specifically referred to therein, must show the distances between the stations between which such rates are to be applied. For the present the Commission will not apply this rule to ordinary mileage tickets or books for passenger travel.

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*June 29, 1909.*

**203. SUBSTITUTION OF TONNAGE IN TRANSIT.**—(Cancels ruling 85. Ruling 203 withdrawn February 10, 1913. see *The Transit Case*, 24 I. C. C., 344, and 26 I. C. C., 210.)

**204. TRANSIT PRIVILEGES.**—It is the sense of the Commission that no transit privilege should extend beyond one year. (Qualified by ruling 232.)

**205. LIABILITY FOR MISROUTING.**—An initial carrier misrouted a shipment, resulting in additional transportation charges, for which it admitted its responsibility and made settlement in accordance with Rule 70 of Tariff Circular No. 15-A (Ruling 214 of this bulletin). Subsequently the connecting line over which the shipment moved became a party to a tariff naming the same rate that applied at the time of the movement over another route. Thereupon the initial carrier and the connecting line requested permission to divide the misrouting overcharge: *Held*, That the petition must be denied on the ground that such a course would amount to the retroactive application of a published rate. (See rulings 200*b* and 220*h*.)

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*July 2, 1909.*

**206. PROCEDURE IN FORMAL CASES.**—(See current Rules of Practice.)

*September 15, 1906.*

**207. PAYMENT FOR TRANSPORTATION.**—Nothing but money can be lawfully received or accepted in payment for transportation subject to the act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates or fares in effect at the time, precludes the acceptance of services, property, or other payment in lieu of the amount of money specified in the published schedule. (See *In the Matter of Transportation of Company Material*, 22 I. C. C., 439; *C. I. & L. Ry. Co. v. U. S.*, 219 U. S., 486; *L. & N. R. R. v. Mottley*, 219 U. S., 467; and *N. Y. Central R. R. v. Gray*, 239 U. S. 583.)

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*October 12, 1906.*

**208. FREE PASSES AND FREE TRANSPORTATION.**—  
(a) The provisions of the act relative to the issuance of free tickets, free passes, free transportation, or free carriage to employees of carriers apply only to persons who are actually in the service of the carriers and who devote substantially all of their time to the work or business of such carriers. Land and immigration agents unless they are bona fide and actual employees, representatives of correspondence schools, agents of accident or life insurance companies, agents of oil or lubricating companies, etc., are not within the classes to which free or reduced-fare transportation can be lawfully furnished. (See rulings 95, 308, 412, 449, 454, and 466.)

(b) But the Commission does not construe the law as preventing a carrier from giving necessary free transportation to a person traveling over its line solely for the purpose of attending to the business of or performing a duty imposed upon the carrier, nor from giving free carriage over its line to the household and personal effects of an employee who is required to remove from one place to another at the instance of or in the interest of the carrier by which he is employed. (See rulings 109, 134, 255, 361, 478, and 479.)

(c) Nor does the Commission construe the law as preventing a carrier from giving free or reduced-rate carriage over its line

to contractors for material, supplies, and men for use in construction, improvement, or renewal work on the line of that carrier, provided such arrangements for free reduced-rate carriage are made a part of the specifications upon which the contract is based and of the contract itself. (See rulings 386 and 413; also *Railroad-Telegraph Contracts*, 12 I. C. C., 11.)

(d) The provision of the act relative to the issuance of free or reduced-fare transportation to ministers of religion do not apply to or include members of the families of ministers of religion. Neither do the provisions of the act relative to the issuance of free or reduced-fare transportation admit of including therein officers of the Government, the army, or the navy, or members of their families, or other persons to whom such considerations may have been extended in the past, unless they are within the classes specifically named in the act.

Reduced rate or fare transportation may be granted to such persons as are specified in the law as those to whom free transportation may be given. (See ruling 95.)

(e) Section 22 of the act authorizes carriers to grant free or reduced-rate transportation of property for the United States, state, or municipal governments, or for charitable purposes or for exhibition at fairs or expositions. It also authorizes free or reduced-fare transportation of certain specified persons. This special provision and the words "reduced rates" are construed to be special authority for carriers to depart from established tariff rates or fares; and for such transportation as is provided for in said section 22 it is not necessary for carriers to provide tariffs or observe tariff rates or fares and regulations excepting in the issuance, sale, and use of mileage, excursion, or commutation passenger tickets, and joint interchangeable mileage tickets. As to these, the provisions of section 6 with regard to publishing, filing, posting, and observing tariffs must be complied with. (See rulings 33, 36, 65, 218, 244, 297, and 311; compare ruling 107.)

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November 16, 1906.

**209. DIVISION OF JOINT RATES OR FARES—CONTRACTS AND AGREEMENTS FOR, MUST BE FILED.**—A contract, agreement, or arrangement between common carriers,

governing the division between them of joint rates or fares on interstate business, is a contract, agreement, or arrangement in relation to traffic within the meaning of section 6 of the act to regulate commerce, and a copy thereof must be filed with the Commission. Where such contract, agreement, or arrangement is verbal, or is contained in correspondence between the parties, or rests on their custom and practice, a memorandum of its terms must be filed with the Commission.

When the agreement or arrangement under which divisions are made is in the form of a contract or formal agreement or recorded memorandum, a copy of each such contract, agreement, or memorandum is to be filed with the Commission. Where such arrangement is made by correspondence or verbally, a concise memorandum of the basis and general terms and application of the arrangement or practice is to be filed with the Commission. The filing of the division sheets themselves is not desired. (See ruling 269 and 372; amended by order in *Division of Joint Rates on Railway Fuel Coal*, 37 I. C. C., 265.)

**210. CORRESPONDENCE WITH COMMISSION ON FREIGHT AND PASSENGER MATTERS.**—It is believed that the best results and understandings will be reached if the conducting of ordinary correspondence between carriers and the Commission is confined to as few persons as possible. Request is therefore made that the traffic manager or the general passenger and general freight agents of each road designate not more than two officials or other representatives to respectively conduct the correspondence with the Commission on freight and passenger matters and to promptly advise the Commission of such appointments.

**211. DISTRIBUTION OF OFFICIAL CIRCULARS AND RULINGS.**—It is obviously impracticable for the Commission to place copies of its official circulars and rulings in the hands of all the officers of carriers or to furnish copies for distribution among them. The officers at the head of the traffic departments, or in charge of the passenger and freight departments, respectively, will please designate for each road one official in the passenger department and one in the freight department (un-

less both are under one head officer and one appointment is considered sufficient), to whom such circulars and rulings are to be sent; and arrange for such designated officials to disseminate the information among other interested officers and agents. Please report these appointments to the Commission as early as possible.

With the view of giving prompt information to those who may be interested, the Commission will upon application place upon its mailing list regularly organized boards of trade, chamber of commerce, commercial clubs, and shippers' associations, for the purpose of mailing to them copies of official circulars containing rulings and orders of the Commission.

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*January 21, 1907.*

**212. TRANSPORTATION OF NEWSPAPER EMPLOYEES ON SPECIAL NEWSPAPER TRAINS.**—In *Transportation of Newspaper Employees*, 12 I. C. C. 15, on the petition of certain newspapers in New York City, the Commission decided that a commodity rate may not be applied to the transportation of passengers or a passenger fare to the transportation of a commodity, and that therefore employees of the newspapers, riding on special newspaper trains, can not lawfully be transported under a commodity rate established for the carriage of newspapers or at any rate other than the one specified in the regularly published schedule of passenger fares.

**213. DIVERTING TRAFFIC BECAUSE OF BLOCKADES.**—(a) Whenever, by reason of blockade upon the line of a carrier resulting from storm, washout, wreck, or similar casualty, it becomes necessary for it to divert to the line of another carrier passengers or freight that are in transit, the carrier so diverting its business should pay the carrier or carriers, upon whose train such passengers or freight are carried, regular tariff rates or fares from and to the points between which it or they transport such diverted traffic, except that if the carrier accepting such diverted traffic is participant in a joint tariff in which the diverting line is also a participant and under which the diverted traffic is being moved, settlement may be made on basis of the division of the through joint rate or fare. (See rulings 83, 138, 146, 147, and 183.)

(b) If, because of such blockade, a carrier's train is detoured over the line of another carrier, or special train is arranged for movement of the interrupted traffic, the tariff rates or fare, if there be any for such movement, must be applied. In the absence of such tariff regulations compensation should be agreed upon. (See ruling 138.)

This rule does not apply in cases of congested lines due to heavy traffic or ordinary causes. (See *Woodward & Dickerson v. L. & N. R. R. Co.*, 15 I. C. C., 170.)

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*March 18, 1907.*

**214. ROUTING AND MISROUTING FREIGHT.**—(a) Alleged neglect or errors on part of agents of carriers in misrouting shipments lead to numerous claims of overcharge, many of which are meritorious. The lawful charge on any shipment is the tariff rate via the route over which the shipment moves. No carrier can lawfully refund any part of the lawful charge except under authority so to do from the Commission or from a court of competent jurisdiction. (See ruling 286-a.) That thorough understanding and uniform practice may be had in this connection, the Commission issues the following administrative ruling:

(b) In order to secure desired delivery to industries, plants, or warehouses and avoid unnecessary terminal or switching charges, the shipper may direct as to terminal routing or delivery of shipments which are to go beyond the lines of the initial carrier; and his instructions as to such terminal delivery must be observed in routing and billing such shipments. The carrier may not disregard the instructions of shippers as to intermediate routing, except when tariff of initial line reserves the right to carrier to dictate intermediate routing. When such reservation is made in tariff, (1) where all-rail rates and rail-and-water rates are available the agent of carrier must have the shipper designate which of the two he wishes to use; and (2) the agent must not route shipment via a route that will be more expensive to the shipper than the one desired by him, or that does not furnish substantially as good and expeditious service. If carrier is not willing to observe the intermediate routing instructions of shipper it must not execute bill of lading

containing such routing. Carriers will be held responsible for routing shown in bill of lading. (See rulings 190, 284, and 316. Amended by ruling 321.)

(c) In the absence of specific through routing by shipper, which carrier is willing to observe, it is the duty of the agent of the carrier to route shipment via the cheapest reasonable route known to him of the class designated by the shipper—that is, all-rail, or rail-and-water—and via which he has rates which he can lawfully use. If a foreign car is available which under rules as to car service must be sent via a particular line or route over which a higher rate obtains, agent must explain to shipper that fact and allow shipper to elect whether he will use that car at the higher rate or wait for another car. If shipper elects to use the car at the higher rate, agent should so note on bill of lading. If agent is in doubt, he should secure information from proper officers of traffic department. It is important that agents at initial points be able to, and that they do, quote correct rates and give correct routings. (See rulings 91, 140, 190, 284, 316; also *United Portland Cement Co. v. M. P. Ry. Co.*, U. R. Op. A-321; *Lord & Bushnell Co. v. M. C. R. R. Co.*, 22 I. C. C., 463; *Meeds Lumber Co. v. A. & V. Ry. Co.*, 38 I. C. C. 679; *Donahue-Stratton Co. v. C. M. & St. P. Ry. Co.*, 38 I. C. C., 739; and *Chattanooga Implement & Mfg. Co. v. L. & N. R. R. Co.*, 40 I. C. C. 146.)

(d) If a carrier's agent misroutes a shipment and thus causes extra expense to the shipper over and above the lawful charges via another available route of the class designated by shipper—that is, all rail or rail and water—over which such agent had applicable rates which he could lawfully use, and responsibility for agent's error is admitted by the carrier, such carrier may, as to shipments moving subsequent to March 18, 1907, adjust the overcharge so caused by refunding to shipper the difference between the lawful charge via the route over which shipment moves and what would have been the lawful charges on same shipment at the same time via the cheaper available route of the class designated which could have been lawfully used. Such refund must in no case exceed the actual difference between the lawful charges via the different routes as specified, and must in every instance be paid in full by the carrier whose agent caused such overcharge and must not be shared in by or divided with any other carrier, corporation, firm, or person. This authority is limited strictly

to the cases specified and to the circumstances recited and does not extend or apply to instances in which soliciting or commercial agents of carriers induce shippers to route shipments over a particular line via which a higher rate obtains than is effective via some other line. (See rulings 93 and 286; also *Duluth & Iron Range R. R. Co. v. C., St. P., M. & O. Ry. Co.*, 18 I. C. C., 485.)

(e) The rule is intended to apply to cases in which the agents who bill or actually forward or divert shipments through error or oversight send the shipments via routes that are more expensive than those directed by shippers or available in the absence of routing instructions by shippers. It must not be used in any case or in any way to "meet" or "protect" a rate via another route or gateway via which the adjusting carrier has not in its tariffs at the time the shipment moves rates which are available and lawfully applicable thereto, nor as a means or device by which to evade tariff rates or to meet the rate of a competing line or route, nor to relieve shipper from responsibility for his own routing instructions.

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*November 15, 1907.*

(f) The prerequisites to any refund under this rule are admission by carrier of responsibility for its agent's error in misrouting the shipment, and such carrier's willingness to bear the extra expense so caused, without recourse upon any other carrier for any part thereof. If, therefore, the error is discovered before the shipment has been delivered to consignee or before charges demanded upon same have been paid, the carrier acknowledging responsibility for the error may authorize the delivering carrier to deliver shipment upon payment of the charges that would have applied but for the misrouting and to bill upon it for the extra charge; or, if the shipment has been delivered undercharged before the error is discovered, the carrier that acknowledges responsibility for the error may pay the undercharge to the carrier that delivered the shipment instead of requiring it to collect the undercharge from shipper, to be refunded to shipper. (Interpreted by ruling 198.)

Complete distinction must be observed between cases to which this rule applies and those provided for under ruling 217.

(g) Shippers must bear in mind that there is a limit beyond which an agent of a carrier could not reasonably be expected to know as to terminal delivery or local rates at distant points and on lines of distant roads to or with which he has no specific joint through rates. Consignors and consignees should cooperate with agents of carriers in avoiding misunderstandings and errors in routing and must expect to bear some responsibility in connection therewith. (See *What Cheer Tool Co. v. K. & M. Ry. Co.*, U. R. Op. 2159, and *Isbell & Co. v. L. S. & M. S. Ry. Co.*, 19 I. C. C., 450.)

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*March 9, 1909.*

(h) If, under this rule, a carrier adjusts a claim for misrouting and later learns that the responsibility for misrouting actually rests upon another carrier, such other carrier may voluntarily reimburse the carrier that made the payment in the full amount of such payment, or the matter may, if necessary, be referred to the Commission for determination of the question of which carrier is responsible for the error.

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*April 6, 1909.*

(i) Restated in ruling 474c.

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*March 18, 1907.*

**215. COMBINATION OF JOINT RATE OR FARE TO COMMON POINTS AND LOCAL RATE OR FARE BEYOND.—**

(a) In order to secure uniformity in practice and understandings and to remove the cause of many complaints, the Commission decides that when a joint through rate or fare is the same to two or more points and rate or fare on through shipment or passenger to local station to which no specific joint through rate or fare applies is made up by combination of such joint through rate or fare to common points and local rate or fare beyond, the rate or fare for through shipment or passenger must be determined by calculating the joint through rate or fare to the point from which the lower local rate or fare applies to point of destination and adding thereto such local rate or fare. For example: Joint through tariff names the same rates or fares

from certain eastern points to Chicago and Milwaukee. If shipment or passenger is destined to a point to which the local rate or fare is less from Milwaukee than from Chicago, the rate or fare applied should be the joint through rate or fare to Milwaukee plus the local rate or fare from Milwaukee to destination, and unless the lines of delivering carrier reach both Chicago and Milwaukee the shipment or passenger should move via Milwaukee. If the local rate or fare from Chicago to point of destination is lower than from Milwaukee, the rate or fare should be the joint through rate or fare to Chicago plus the local rate or fare from Chicago to destination, and unless the lines of delivering carrier reach both Milwaukee and Chicago the shipment or passenger should move via Chicago. (See *Larrowe Milling Co. v. C. & N. W. Ry. Co.*, 17 I. C. C., 443 and 548; also *Rehberg & Co. v. Erie R. R. Co.*, 17 I. C. C., 508.)

(b) Rates or fares for outbound through movements from such local stations and under like circumstances must be applied on the same basis where the joint through rates or fares are the same from two or more points.

(c) This does not authorize any carrier to apply to transportation over its lines any rate or fare except those stated in its own lawfully published tariffs or in the lawfully published joint tariffs in which it has concurred. If a carrier desires to "meet the rate" of a competitor, it must do so by lawfully including in its own tariffs such specific rates or fares, proportional or otherwise, as may be necessary so to do. (See rulings 195 and 214.)

(d) It is suggested that shippers can assist in avoiding mistakes and misunderstandings by calling attention to the rate that should apply in such cases as come under this rule by indicating it on shipping bill in connection with routing instructions; for instances, "Rate on Milwaukee." This is, however, merely a suggestion, and does not relieve the agents of carriers from the responsibility of quoting and applying the correct lawful rate.

(e) This rule does not apply where a shipment has reached its destination as originally given by shipper and has been re-consigned, except when tariff contains reconsigning rule that provides for such application.

(f) This rule must not apply in any case where there is an applicable specific joint through rate or fare from point of origin to point of destination. (See Rule 55, Tariff Circular 18-A.)

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*March 25, 1907.*

**216. FREE TRANSPORTATION OF OFFICERS OR EMPLOYEES OF OMNIBUS OR BAGGAGE EXPRESS COMPANIES.**—In its decision on the petition of the Frank Parmelee Company (*Exchange of Free Transportation*, 12 I. C. C. 39) the Commission held that a carrier subject to the act can not lawfully give free transportation to officers, agents, or employees of an omnibus or baggage express company, except, as authorized in the act, for baggage agents who meet passenger trains at some point near the larger cities and go through the trains to arrange for transfer of passengers and their baggage. (See ruling 95a, par. 3, and 95g.)

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*May 6, 1907.*

**217. RETURN OF ASTRAY SHIPMENTS.**—Instances occur in which, through error or oversight on the part of some agent or employee, a shipment is billed to an erroneous destination or is unloaded short of destination or is carried by. The Commission is of the opinion that in *bona fide* instances of this kind carriers may return such astray shipments to their proper destination or course without the assessment of additional charges, and may arrange for such movement of such astray shipments for each other on mutually acceptable terms without the necessity of publishing, posting, and filing tariff under which it will be done. (See rulings 31 and 240.)

Complete distinction must be observed between cases to which this rule applies and those provided for under *Conference Ruling 214*.

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*May 27, 1907.*

**218. TRANSPORTATION OF FEDERAL TROOPS.**—The Commission is of the opinion that carriers, either by contract or bid or other arrangement with the War Department, may law-

fully make special rates or fares for the movement of federal troops, when moved under orders and at the expense of the United States government, and that the rates or fares so made need not be posted or filed with the Commission. (See rulings 33 and 208e.)

The lawfully published rates or fares for the transportation of the general public, in the opinion of the Commission, are to be regarded, however, as the maximum rates and fares that may lawfully be charged the government for the movement of federal troops. (See *United States v. A. & V. Ry. Co.*, 40 I. C. C., 406.)

This ruling also governs similar transportation for the naval and marine services. (Ruling does not apply to state or territorial troops; see ruling 297.)

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June 3, 1907.

**219. TRANSPORTATION OF MEN OR PROPERTY FOR TELEGRAPH COMPANIES.**—(a) In its decision on the petition of the Western Union and Postal Telegraph companies, in *Railroad-Telegraph Contracts*, 12 I. C. C., 10, the Commission held it would be unlawful for a carrier subject to the act to contract or stipulate with a telegraph company for the carriage of its officials, employees, or property for any greater or less or different compensation than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of telegraph line and service on its own line. It was held that a group of separately incorporated roads, recognized as a "railway system," may be considered as one in the making of contracts for telegraph service on that system. (Modified by ruling 491. See also rulings 95a, par. 2, 161, and 364; see also amendatory act of June 18, 1910, interpreted in ruling 305.)

(b) This definitely differentiates between the employees of the telegraph company who are actually engaged in constructing and maintaining a telegraph line along the line of a railway, or in operating such telegraph line as a part of the actual operation of that railway, and those who are engaged in the commercial business of the telegraph company. The fact that railway officials may, by use of deadhead franks, send messages on railway business from or receive such messages at a commercial office

of a telegraph company does not constitute that office a part of the operation of any of the lines of railway which such officials represent nor bring that telegraph office into such relationship with the business of the railways as to warrant treating it as part of the operating facilities of such railways. Practically all telegraphing so done is "off the line" business and is to be considered as commercial business. The same distinction is to be observed in the hauling of materials and supplies for telegraph companies with which the railway company has contract for telegraphic service. (Amended by ruling 491. See also ruling 305.)

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*November 15, 1907.*

(c) This rule applies also to telephone service, and carriers that have not already done so are hereby requested and called upon to promptly file with the Commission copies of all contracts for telegraph or telephone service on their lines. (See ruling 305.)

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*June 7, 1907.*

**220. SPECIAL REPARATION ON INFORMAL COMPLAINTS.**—(a) To assist in the settlement of certain claims of shippers against carriers, and as a practical means of disposing with promptness of informal complaints that might otherwise develop into formal complaints, and in connection with which the unreasonableness of the rate or regulation is admitted by the interested carrier or carriers, the Commission on full information will authorize adjustment by special order if all of the facts and conditions warrant such action. The connections in which the Commission has authority to modify the provisions of the law are specified in the act. The Commission will not assume to modify it in any other connections or features.

(b) The instances in which the Commission will authorize refund or reparation on informal complaint and in an informal way will be confined to those in which the informal showing develops plainly a case in which the Commission would award reparation on formal hearing and in which an adjustment agreeable to complainant and carrier or carriers and in conformity with the provisions of the law is reached.

(c) (Superseded by ruling 396.)

(d) No carrier may pay any refund from its published tariff charges save with the specific authority of the Commission in accordance with the provisions of the act. When an informal or formal reparation order has been made by the Commission the principle upon which it is based shall be extended to all like shipments, but no refunds shall be made upon such like shipments except upon specific authority from the Commission therefor. (See rulings 49 and 200c; also *Bergerman v. A., T. & S. F. Ry. Co.*, U. R. Op. 2132.)

(e) The shipper should pay the lawfully published charges applicable via the route over which the shipment moves, and make claim for refund if he believes he has been overcharged. The Commission will not ordinarily include in reparation award demurrage charges which accrue pending adjustment or subsequent to consignee's refusal to accept the shipment and pay the lawful charges thereon, but in special cases such demurrage charges may be included in the amount of refund. (See ruling 32.)

(f) It is the duty of the delivering carrier to collect, and of the consignee to pay, demurrage charges as per lawful tariffs. Demurrage charges accruing because of error of a carrier are considered in the same light as are other additional transportation charges caused by carrier's error; and if adjusted, the full expense thereof must be borne by the carrier whose agent is responsible for the error. (See ruling 214; see also note to ruling 242; see Code of National Car Demurrage Rules; also *Middle West Coal Co. v. C. & O. Ry. Co.*, 41 I. C. C., 724.)

(g) The Commission has repeatedly announced the view that the law does not permit the use of any rate or fare except that contained in a lawful tariff that is applicable via the line, route, and gateway over and through which the shipment or passenger moves. The lawful rate or fare for through movement is the through rate or fare, wherever such through rate or fare exists, even though some combination makes a lower rate or fare and even though the practice in the past has been to give to some the benefit of such lower combination. The Commission long since extended to carriers, in a general order, permission to reduce, on one day's notice, a joint commodity or class rate or fare that is higher than the sum of the intermediate rates between the

same points to make it equal the sum of such intermediates. If, therefore, carriers have maintained through rates or fares that are higher than the sums of the intermediates between the same points, it is because of their desire so to do, and not, as some agents of carriers have informed shippers, because the law or the Commission forces them to do so. (See Rule 56, Tariff Circular 17-A or 18-A; also ruling 443.)

(h) If a carrier desires to give its patrons the benefit of the same rate or fare that applies via another line or gateway, and which is lower than its own rate or fare, it can do so by lawfully incorporating that rate or fare in its own tariffs, and so give the benefit of it to all of its patrons alike. The law forbids giving such lower rate or fare to one and withholding it from another, but neither the law nor the Commission stands in the way of adoption in lawful manner of the lower rate or fare as available for all. (See ruling 205.)

(i) The Commission's power to authorize shipments will not be exercised in such way as to create the very discriminations which the law aims to prevent. No doubt instances will occur in which seeming hardship will come to some. Much of such embarrassment will be avoided if agents of carriers and shippers take pains to be certain that correct rates are quoted and correct routing is given.

(j) Claims filed since August 28, 1907, must have accrued within two years immediately prior to the date upon which they are filed; otherwise they are barred by the statute. Claims filed with the Commission on or before August 28, 1907, are not affected by the two years' limitation in the act. The Commission will not take jurisdiction of or recognize its jurisdiction over any claim for reparation or damages which is barred by the statute of limitation, as herein interpreted, and the Commission will not recognize the right of a carrier to waive the limitation provisions of the statute. (See rulings 10, 306, and 307.)

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*July 8, 1907.*

**221. REFUNDS AND COMMISSIONS.**—(a) The act prohibits a carrier from demanding, collecting, or receiving a greater or less or different compensation for transportation than that named in its tariffs in effect at the time. It prohibits the re-

bating or refunding to any person in any manner, or by any device, whatsoever, any part of the lawful charges so collected. It is therefore manifestly unlawful for a carrier to refund to any association, committee, or person any part of the charges collected by the carrier as a condition of the sale of transportation. A carrier's agents may, as a matter of convenience, sell admission tickets to entertainments in connection with which excursion-fare tickets are sold, but the purchase of such admission ticket must not be made a condition of the sale of transportation ticket. (See ruling 7.)

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*March 1, 1908.*

(b) The act does not prohibit a carrier from providing in its own interest and as a means of stimulating travel over its line an entertainment at a point on its line; nor from contributing to the expense of such an entertainment if such contribution be made in a definite sum and be in no way dependent or contingent upon the number of tickets sold, and provided that no part of such contribution be by any device or through any person whatsoever permitted to effect any departure from or discrimination under the carrier's tariff fares.

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*May 12, 1908.*

(c) The ruling of the Commission on this date, published in *Conference Rulings Bulletin No. 1*, was amended on February 14, 1911, to read as follows:

A carrier may employ an agent to act for it in working up passenger excursions and make his compensation depend upon the results of his efforts by executing a contract in the following form and filing a copy with the Commission, together with reference by I. C. C. number to the tariff which contains the fares. Any person so appointed becomes in fact the agent of the appointing carrier, and such carrier will be, and will be held, responsible and liable for his acts as its agent. If any part of the compensation paid by a carrier to such an agent is used or is permitted to be used, either directly or indirectly, in such way as to reduce for any person the lawful tariff charges of any carrier subject to the act to regulate commerce, the agent or agents and the carriers or carriers causing or permitting such

departure from the lawful tariff charges will be held to full responsibility and liability therefor: .

The \_\_\_\_\_ rail \_\_\_\_\_ company, having arranged to run an excursion from \_\_\_\_\_ to \_\_\_\_\_ and return, on \_\_\_\_\_, to be known as the \_\_\_\_\_ excursion, at the following fare: Adults, \_\_\_\_\_; children, \_\_\_\_\_, hereby appoints \_\_\_\_\_, residing at \_\_\_\_\_, its agent to solicit and develop business for said excursion and accepts responsibility and liability for the acts of said agent. The said \_\_\_\_\_ hereby agrees to devote to this work such portion of his time from \_\_\_\_\_ to \_\_\_\_\_ as may be necessary, in consideration of which the \_\_\_\_\_ rail \_\_\_\_\_ company agrees to compensate him as follows: If \_\_\_\_\_ adult tickets, or their equivalent, are sold \_\_\_\_\_ cents for each adult and \_\_\_\_\_ cents for each half tick so sold.

It is understood and agreed that no compensation will be paid hereunder if less than \_\_\_\_\_ adult tickets, or their equivalent, are sold.

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*April 13, 1908.*

**222. DEMURRAGE ON PRIVATELY OWNED CARS.—**The Commission decided in *Demurrage Charges on Privately Owned Tank Cars*, 13 I. C. C., 378, that private cars owned by shippers and hired to carriers upon a mileage basis are subject to demurrage when said cars stand upon the tracks of the carrier either at point of origin or destination of shipment, but are not so subject when upon either the private track of the owner of the car or the private track of the consignee. The carrier must charge demurrage in all cases where such demurrage is imposed by tariff provision upon its own equipment, except when a privately owned car is upon a privately owned siding or track and the carrier is paying or is responsible for no rental or other charge upon such car. (Modified and explained by ruling 79; see important note to ruling 242; see also Rule 75 of Tariff Circular 18-A and rulings 123 and 270 of this bulletin; and Code of National Car Demurrage Rules.)

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*May 12, 1908.*

**223. DEMURRAGE ON INTERSTATE SHIPMENT.—(a)** The act requires that carriers shall publish, post, and file "all terminal charges \* \* \* which in any wise change, affect,

or determine \* \* \* the value of the service rendered to the passenger, shipper, or consignee," and all such charges become a part of the "rates, fares, and charges" which the carriers are required to demand, collect, and retain. Such terminal charges include demurrage charges.

(b) On March 16, 1908, the Commission decided that demurrage rules and charges applicable to interstate shipments are governed by the act to regulate commerce, and therefore are within its jurisdiction and not within the jurisdiction of state authorities. Any other view would open a wide door for the use of such rules and charges to effect the discriminations which the act prohibits. (Reaffirming ruling 54.)

(c) (Amended and restated by ruling 135.) (See Code of National Car Demurrage Rules.)

**224. TRANSPORTATION OF TRUCKS OF CARS DESTROYED ON FOREIGN LINES.**—If a car of one company is destroyed on the line of another company and the lines of those two companies directly connect with each other, the carrier upon whose line the car is destroyed may transport free, as its own property, to junction with the line of the carrier owning the car, the trucks of the destroyed car, which are understood to be salvage from a wreck, the cost of which must be borne by the carrier on whose line it occurs. If there is not direct connection between the line of the carrier owning the car and the line upon which it is destroyed, the carrier on whose line the car is destroyed may transport the trucks free to a junction with an intermediate carrier, and pay to the intermediate carrier or carriers their full tariff rates for transporting them to a junction with the line of the carrier owner of the car destroyed, and such owner may transport them on its own line as its own property.

It does not appear to the Commission that opportunity for abuse or discrimination is opened by this practice. It does not appear to transgress the Commission's rule that carriers may not haul freight free for each other; and it is approved with the reservation that if discrimination or unlawful practice is found to grow out of it the plan will be condemned. (See ruling 225.)

November 13, 1908.

**225. CARRIERS MAY NOT BE GIVEN PREFERENTIAL RATES.**—(a) In answer to inquiries the Commission expresses the opinion that under the law a carrier, or a person or corporation operating a railroad or other transportation line, may not, as a shipper over the lines of another carrier, be given any preference in the application of tariff rates on interstate shipments, but it may lawfully and properly take advantage of legal tariff joint rates applying to a convenient junction or other point on its own line, provided such shipments are consigned through to such point from point of origin and are, in good faith, sent to such billed destination. In other words, one carrier shipping its fuel, material, or other supplies over the lines of another carrier must pay the legal tariff rates applicable to the same commodities shipped by an individual, but when a carrier is the consignee of a shipment of its own property which moves under a joint rate and is to participate in the haul of same via its own line, routing instructions of consignor to a specified junction point on the line of consignee carrier must be observed. There may be some instances, such as movement of needed fuel, in which, in order to keep the trains or boats moving, such traffic could temporarily be given preference in movement without creating unjust or unwarranted discrimination. (See rulings 153, 224, and 373; also *In the Matter of Restricted Rates*, 20 I. C. C. 427; *Beekman Lumber Co. v. L. & N. Ry. Co.*, 21 I. C. C. 281; *In the Matter of Transportation of Company Material*, 22 I. C. C., 440; *American Brake Shoe & Foundry Co. v. A. G. S. R. R. Co.*, 26 I. C. C., 448; and *Divisions of Joint Rates on Railway Fuel Coal*, 37 I. C. C., 266.)

(b) Where stock in one carrier company is owned by another carrier company but both maintain separate organizations and report separately to the Commission, they may not lawfully carry property free for each other. (Restating ruling 9. See *I. C. C. v. B. & O. R. R.*, 225 U. S., 326.)

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November 9, 1909.

**226. SIGNATURE TO RELEASED VALUATION CLAUSES ON BILLS OF LADING.**—Rule 6 of the Southern Classification provides that where the tariff offers a reduced

rate based on a certain fixed valuation a release, in the form specified in the tariff and containing the agreed valuation, must be written and signed by the shipper on the face of the bill of lading. As applied to a case where the shipper indorsed the released valuation on the bill of lading, but, not knowing the requirements of the rule, omitted to indorse the special form across its face, it was *Held*, That the rule is unreasonable and that it is the carrier's duty to secure the shipper's signature to such a release on the bill of lading when it has reasonable notice of his desire to take advantage of the lower rate upon a released valuation. (Compare ruling 160.)

**227. EXCHANGE BILLS OF LADING.**—It is the view of the Commission that exchange bills of lading ought to show specifically the point of origin of the shipment and the route over which it has moved. (See ruling 415.)

**228. REDEMPTION OF MILEAGE BOOKS.**—The rules governing the sale, use, and redemption of mileage books should be a part of the tariff under which they are sold. If a carrier deems it wise to provide in such rules for the redemption of unused portions of such books on the basis of the mileage rate for the portion used, it will be recognized by the Commission as redemption "at the full tariff rates" within the meaning of *Conference Ruling 76*, of this bulletin, when the books were sold under tariff authority and on the basis of a specific sum per mile.

**229. LINE JOINTLY OPERATED THROUGH SEPARATE COMPANY MUST CONCUR IN TARIFFS FOR THROUGH TRAFFIC.**—Two carriers desiring a joint operation of their combined lines between two points propose that they shall be operated by a new and separate company which shall handle as its own, and under its own tariffs, all local business between those points, and shall handle all other business under some arrangement with the two lines which does not permit it to participate in the earnings on the through traffic: *Held*, That *Conference Ruling 108*, entitled "Lessee road not serving as common carrier," does not apply and that the road operating between the two points must concur in the through rates over its line.

*November 22, 1909.*

**230. TRANSIT PRIVILEGE—RESPONSIBILITY OF CARRIER FOR MISROUTING.**—As the agent of an intermediate carrier has no means of knowing just why a shipment has been routed through particular junctions, he has no right to substitute his own judgment as to routing for the specific routing instructions accompanying the shipment. In a stated case the initial carrier issued bills of lading showing particular routing but not rates; the transfer billing subsequently issued to a connecting line showed the routing and a 10-cent division of a 33-cent rate that did not apply through the junctions named but through another junction; and the agent of the connection therefore diverted the shipment through the latter junction to destination. It subsequently appeared that because of the diversion the shipper had lost a transit right at a given point on the route specified, which was necessary to effect the sale of the shipment at destination: *Held*, That as tariffs are permitted to contain rules providing that they are subject to the transit privileges shown on the tariffs of individual carriers on file with the Commission, the intermediate line was responsible to the shipper for the difference between the rate paid in order to get the shipment back to the transit point and the legal rate over the route directed by the shipper. (See ruling 214.)

**231. CARRIER MUST FIND THE RATE NAMED BY SHIPPER AND ROUTE ACCORDINGLY OR ASK INSTRUCTIONS.**—(Canceled by ruling 474-c.)

**232. CREOSOTING LUMBER—TRANSIT PRIVILEGE OF EIGHTEEN MONTHS NOT EXCESSIVE.**—The Commission has expressed the view that a transit privilege extending through a period of more than one year is *prima facie* unreasonable. (Ruling 204.) Experience has shown, however, that as applied to the creosoting of lumber a period of eighteen months is not unreasonably long, provided the full local rates on the inbound material are required to be paid. (See *National Lumber & Creosoting Co. v. T. & S. F. Ry. Co.*, 42 I. C. C., 36.)

**233. PARTIAL UNLOADING AT INTERMEDIATE POINT OF SHIPMENTS.**—Upon inquiry as to the legality of a practice permitting the stoppage of shipments of perishable

commodities at points short of destination to partly unload: *Held*, That the practice is legal only when authorized under proper tariff rules.

**234. MISROUTING RESULTING IN WRONG TERMINAL DELIVERY.**—(Restated and modified in ruling 509.)

**235. DRAYAGE CHARGES.**—Certain shipments were delivered at a destination as actually routed by the consignor, but there was a general understanding with the carrier, not covered by tariff provision, that traffic should be diverted at a certain point in order to accommodate consignees located near certain team tracks on the delivering line. The agent having failed to divert the shipments at that point, the consignees were subjected to extra drayage charges: *Held*, That the claim for a refund must be rejected. (See rulings 20 and 234.)

**236. CLAIMS MAY NOT LAWFULLY BE PAID UNTIL THEY HAVE BEEN INVESTIGATED.**—The Commission adheres to *Conference Rule 68*, to the effect that it is not a proper practice for railroad companies to adjust claims immediately upon presentation and without investigation. The fact that shippers may give a bond to secure repayment in case, upon subsequent examination, their claims prove to have been improperly adjusted does not justify the practice. Carriers that have adopted that practice will be expected promptly to discontinue it. (See also ruling 462; also *Charleston & Car. R. R. v. Varnville Co.*, 237 U. S., 597.).

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*November 23, 1909.*

**237. REFUND ON SHIPMENT FORWARDED TO ERRONEOUS DESTINATION THROUGH CONSIGNOR'S ERROR.**—A car of coal was forwarded to the destination named in the bill of lading, but the carrier, not being able to find the consignee and learning that a company of the same name at a near-by point was tracing a coal shipment, reconsigned it to that point without consulting the consignor, and that subsequently proved to be the correct destination: *Held*, That a refund might be allowed upon showing that the additional transportation expense fell on the consignor.

In this connection the general principle is expressed in the following rule: If a shipper sends a shipment to an erroneous destination he should have the right to guard, so far as possible, against resulting loss by disposing of the shipment at that point. The carrier should not, therefore, forward such shipment to another destination with attendant additional transportation charges without having made reasonable effort to secure disposition instructions from the shipper. (See rulings 248 and 433.)

December 6, 1909.

**238. REFUND OF FARE PAID FOR NEW TICKET WHEN LIMITED TICKET ORIGINALLY PURCHASED HAS BEEN LOST OR DESTROYED.**—If a limited passenger ticket is lost or destroyed before being used (and no error or neglect of a carrier's agent is involved), it is not unlawful for the carrier, after the limit of the ticket has expired, to refund to the passenger the extra fare paid as a result of such loss or destruction, provided the loss or destruction, the identity of the claimant as the original holder, and the fact that the extra fare was paid for travel by the original holder over the route and within the limit of the lost ticket, are clearly and definitely proved in a form that becomes a part of the record in the case; and provided it is clearly shown that such ticket has not been used or redeemed by any other person. Such action should be withheld for a sufficient period of time properly and reasonably to guard against the lost ticket being redeemed or used by some person other than the original holder. (Compare rulings 76 and 247. See *Waber v. U. & D. R. R. Co.*, U. R. Op. 2204; and *Müller v. A. C. L. R. R. Co.*, 29 I. C. C., 528.)

**239. CONFLICTING RATES—LOWEST RATE IS THE LEGAL RATE.**—A carrier in reissuing a tariff brought forward certain rates originally named in a previous tariff, and also slightly increased the rates named between the same points on the same commodity in a supplement to the previous tariff: *Held*, That where a tariff contains conflicting rates the lower or lowest of the rates so published is the legal rate. (Compare rulings 50, 70, 101, and 104. See *Ireland & Rollings v. St. L. & S. F. R. R. Co.*, 22 I. C. C., 592.)

**240. SWITCHING MOVEMENT ANALOGOUS TO AN ASTRAY MOVEMENT.**—The yardmen of an interstate carrier being under the impression that a loaded car was empty delivered it to a switching road by which it was switched to a loading point, and the error being there discovered it was thence switched back: *Held*, That while the switching line may treat the shipment as analogous to an astray movement and on that account may waive its charges, if it desires to do so, it may nevertheless lawfully demand and collect of the carrier that made the error its lawful rates for the service performed. (See ruling 217.)

**241. A CANAL BOAT LINE ENGAGED IN THROUGH MOVEMENTS IN CONNECTION WITH A RAIL LINE IS SUBJECT TO THE ACT AND MUST FILE TARIFFS.**—A canal boat line carrying traffic moving from New York City to Canadian points under an arrangement for through movement, the traffic being transferred to a rail line at Buffalo by its own agents or the agents of the railroad, is a common carrier under the act and must file tariffs with the Commission.

**242. UNIFORM DEMURRAGE RULES AND PRACTICES.**—Recognizing the great benefits to be derived from uniformity of car-service rules, the Commission endorses the code which was reported to the National Association of Railway Commissioners and by that association recommended to the state and interstate commissions, it being understood that this action is, of course, subject to the right of the Commission to inquire into the legality or reasonableness of any rule or rules which may be the subject of complaint, and that announcement to that effect be made with the Code of Demurrage Rules.

In view of the exhaustive investigation upon which the Demurrage Code is based, it is to be understood as controlling in cases where any conference ruling previously made conflicts with any of its provisions. (See ruling 404.)

**243. ROUTING INSTRUCTIONS WITH AND WITHOUT NAMING THE RATE.**—A shipment was routed through a certain junction by the consignor, but on the papers presented to the Commission it did not clearly appear whether he also named the rate that had been available through that junction but was

anceled shortly before the movement. The instructions were complied with by the carrier and the new and higher rate applied: *Held*, That this was a shipper's error and the higher rate must be collected unless he also named in the bill of lading the lower rate legally in effect through another junction, in which case carrier was liable. (See ruling 474.)

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*December 7, 1909.*

**244. REDUCED RATES ON PROPERTY FOR THE UNITED STATES OR MUNICIPAL GOVERNMENTS.**—Rule 61 of Tariff Circular 17-A and *Conference Ruling 65* are hereby withdrawn and the previous ruling of February 4, 1908, reported as Conference Ruling 36, is restored. (See rulings 208*e* and 311.)

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*December 13, 1909.*

**245. FREE TRANSPORTATION OF PERSONS UNDER SECTION 22.**—There is nothing in the provisions of section 22 of the act relating to free or reduced rate transportation to warrant carriers in according free transportation to scientists or other employees of a public museum. (See ruling 185.)

**246. COMPLAINTS FILED BY TRAFFIC OR CREDIT BUREAUS.**—While it is the policy of the Commission to entertain complaints instituted on behalf of shippers by traffic or credit bureaus, in all such cases where reparation is awarded, the order will require payment to be made by the defendant carriers either to the consignor or the consignee, as their interests may appear. (Amended by rulings 362 and 517.)

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*December 14, 1909.*

**247. PASSENGER TICKET LOST BY CARRIER THROUGH ERROR.**—Through error a carrier's agent so punched a round-trip ticket to New York as to limit its use to October 14 instead of October 17. The holder at destination requested a correction, the ticket, being sent back for that purpose by the passenger agent, was lost in the mails. The initial carrier's agent at New York secured from its connection a return ticket in lieu of the lost ticket. It now asks that its con-

nections be authorized to accept report of this ticket without revenue: *Held*, That the initial carrier must pay the cost of the return ticket. (Compare ruling 238; see rulings 113, 167, 266, and 277.)

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*January 4, 1910.*

**248. COLLECTION OF ESTABLISHED RATES ON RECALLED SHIPMENT.**—A shipment had moved 150 miles from the point of origin before the consignor discovered that an error had been made in filling the consignee's order. On inquiry by telephone he was informed by the carrier's clerk that the car could be returned without extra charge; and thereupon the consignor requested its return for a correction of the loading. A part of the carload was exchanged, the shipment was again billed out and moved to destination: *Held*, That the Commission can not relieve the carrier from the obligation of collecting the published rates for all the movements actually made. (See rulings 237 and 433.)

**249. OUTBOUND CHARGES ON A SHIPMENT MAY NOT BE REFUNDED BY THE CARRIER AND CHARGED BACK AGAINST THE CONSIGNOR.**—A shipment having been accepted by the consignee at destination and removed to his place of business was subsequently returned to the delivering carrier, the outbound charges were refunded and included in the return waybill as advance charges. Upon delivery of the returned shipment to the original consignor the return charges, as well as such advance charges, were demanded and collected: *Held*, That the published rate for the return movement was the only charge that carrier could lawfully exact from the original consignor.

**250. DEMURRAGE ON CARLOAD SHIPMENT TRANSFERRED INTO TWO CARS.**—(Amended and restated in ruling 357.)

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*January 10, 1910.*

**251. NO REPARATION ON BASIS OF RATE NOT FILED.**—(Restated in ruling 419.)

**252. DESTRUCTION OF DOCUMENTS.**—The destruction of canceled tariffs that have been posted at the stations of a carrier as required by law is not regarded by the Commission as an offense under section 20 of the act so long as a copy of the same tariff is preserved by the carrier in its general files. (See general orders of Commission relating to preservation and destruction of records.)

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*February 7, 1910.*

**253. MISROUTING THROUGH ERROR OF JOINT AGENT OF TWO CARRIERS.**—A shipment originating on one line and not routed by the shipper reached a junction point with another line where a joint agent was maintained. Instead of delivering the shipment to the other line at that point, the joint agent permitted it to go forward on the originating line to another junction point with the second line, over which route the charges were substantially higher than if the second line had taken the shipment at its first junction with the originating carrier: *Held*, That although the agent was a joint agent, he was, with respect to this shipment, acting as agent for the originating carrier, and the cost of his error should be borne by that line alone. (See ruling 286.)

**254. NO REFUND ON THE BASIS OF A RATE NOT EFFECTIVE.**—Through inadvertence a carrier quoted a northbound rate of 26 cents instead of a southbound rate of 29.5 cents. A sale having been effected on the basis of the rate quoted, application is made for authority to refund on that basis. Within a few months after the date of the movement the southbound rate was reduced to 17 cents: *Held*, That reparation on the basis of the northbound rate must be denied, but that an application for authority to refund on the basis of the subsequently established southbound rate would be entertained.

**255. FREE TRANSPORTATION OF HOUSEHOLD GOODS OF EMPLOYEES.**—Upon inquiry, *Held*, That a carrier can not lawfully transport free of charge and deliver to a connection the household goods of an employee who has left its service to accept a position with another carrier. (Reaffirming ruling 109; see also ruling 208b.)

**256. THE LOWEST COMBINATION OF RATES IS THE LAWFUL CHARGES, IN THE ABSENCE OF A JOINT THROUGH RATE, ONLY WHEN BOTH FACTORS ARE FILED WITH THIS COMMISSION.**—Upon a movement from a domestic point to a destination in Canada charges were assessed at a combination of rates both factors of which were on file with this Commission, but which made higher than another combination over the same route one factor of which was on file with the Canadian Commission but not with this Commission: *Held*, That the Commission can not award reparation on the latter combination. (See rule 5, Tariff Circular 18-A, also see ruling 262.)

**257. COMMISSARY CAR OPERATED BY A CARRIER UNLAWFUL.**—A carrier for 25 years has operated a commissary car making two trip monthly with a staple line of meats, groceries, and a restricted stock of shoes, overalls, and other wearing apparel. The sales are limited to employees of the company and their immediate families and are not made for cash, but on tickets signed by the company foreman showing the amount of wages due the holder. The purchases are limited to two-thirds of this amount: *Held*, That the practice is illegal.

Upon a subsequent further consideration of this inquiry it was *Held*, That the operation of such a car is in violation of the commodities clause of the act and also in violation of sections 2 and 3 in that such a practice unjustly discriminates against other persons who pay full tariff rates for the same service.

**258. WAIVER OF UNDERCHARGES.**—(Rescinded by ruling 472.)

**259. FREE TRANSPORTATION FOR RED CROSS SOCIETY.**—Upon inquiry it was *Held*, That interstate carriers would not be in violation either of section 1 or section 22 in according free transportation to a car occupied by the American National Red Cross Society and its attendants when traveling for the purpose of giving courses of instruction looking to the prevention of accidents in mines and factories and on railroads and trolley lines, and of methods for first aid to the victims of such accidents, the car being used also for displaying approved safety appliances and illustrating methods followed in relief work.

**260. THE CREDENTIALS OF EXAMINERS OF THE COMMISSION MUST BE HONORED BY CARRIERS WHETHER PRESENTED WITH OR WITHOUT SPECIAL LETTERS OF ADVICE.**—While it has been the practice of the Commission when examining the accounts of interstate carriers though the board of examiners attached to the Bureau of Statistics and Accounts to give notice in advance to carriers, this is done for the convenience of the Commission and of the carriers and is not a requirement imposed upon the Commission by the law. The credentials of an examiner are all that is necessary to entitle him to free and full access to the carrier's records whether at its general offices or at a station or elsewhere, and the refusal to give access on the presentation of such credentials by an examiner is in violation of the law. The Commission, except in special cases where another course is desirable, will continue to give previous notice of any such examination in writing, unless the refusal of the carriers to honor the credentials of examiners when presented without such notice shall make it necessary to withdraw the practice,

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*February 8, 1910..*

**261. DEMURRAGE ACCRUING BECAUSE OF CARRIER'S FAILURE TO NOTIFY CONSIGNEE.**—Although the tariffs of a carrier provided that it would not accept shipments consigned to "Shippers's Order, Notify" where the party to be notified is not located at destination, it nevertheless accepted such a shipment, and because of its failure on the transfer billing to note the shipper's instructions to notify the consignee at a distant point demurrage accrued at destination: *Held*, That the claim has no standing except upon the carrier's admission that its tariff rule was unreasonable and a showing that it has been changed; and if presented under such conditions and acted upon favorably, the order would require the maintenance of the newly established rule for a period of one year.

**262. MISQUOTATION OF CANADIAN RATES.**—Upon inquiry as to the rates on a locomotive "on cars," from a point in New York to a point in the Province of Quebec, the carrier quoted a rate to Sherbrooke and a 7-cent local rate beyond, at 20 per cent less than the actual weight. Charges were col-

lected upon that basis and the carrier now applies to the shipper for payment of an undercharge arising out of the fact that the tariff naming the rate beyond Sherbrooke contains no provision for a deduction from the actual weight of the shipment. The shipper makes the point that the rate beyond Sherbrooke is a Canadian rate and that the domestic carrier is therefore not prohibited by the act from adjusting the charges on the basis of the rate quoted by it: *Held*, That it would be a violation of law to omit the collection of the undercharge. (Also see ruling 256.)

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*February 14, 1910.*

**263. FREE INTERSTATE TRANSPORTATION TO OFFICERS AND EMPLOYEES OF BRIDGE COMPANIES.**—Upon inquiry by an interstate carrier whether free transportation may lawfully be accorded to the officers and employees of a bridge company which makes annual reports but files no tariffs and collects no charges from shippers or passengers: *Held*, That free transportation may not lawfully be accorded to the officers and employees of a nonoperating company. (See ruling 95 and 355.)

The fact, subsequently developed, that trains move over the bridge only on signal and telegraphic orders by employees of the bridge company was held not to be sufficient ground for modifying the ruling.

**264. CARLOAD MINIMUM UNDER A JOINT THROUGH RATE.**—A tariff named a joint through carload rate from A to D of \$1 and provided that as to 30 cents of the rate the minimum weight should be 20,000 pounds and as to 70 cents of the rate the minimum should be 12,000 pounds. The Commission declined to entertain an informal request for reparation on the basis of that rate until the tariff was changed; and it was said that if the tariff were not changed a formal complaint would be entertained: *Held also*, That where two or more carriers publish a joint through rate they must publish in connection therewith one carload minimum weight for the through movement under that rate. This ruling is not to be understood, however, as condemning the publication in joint tariffs and the use of through rates made up in combination on a specific base point

and providing one minimum weight in connection with the specified portion of the rate up to the base point and a different minimum weight in connection with the specified portion of the rate beyond the base point.

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*February 17, 1910.*

**265. REFUND OF PORTION OF UNUSED PASSENGER TICKET.**—A man and wife holding round-trip tickets embracing a stop-over privilege at an intermediate point returned from that point without completing the rest of the journey. The tariff naming the excursion rate under which the tickets were sold also named an excursion rate to that intermediate point and return and prescribed the same conditions: *Held* That the case falls within *Conference ruling 76*. (Affirmed by ruling 303; see also ruling 115.)

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*March 7, 1910.*

**266. REFUND ON PASSENGER TICKET.**—In selling a round-trip ticket the carrier's agent neglected to punch the return limit in the margin. The ticket was used on the going journey in accordance with its conditions. The tariff permitted a stop-over at an intermediate point on the return journey. When the holder presented the ticket for validation that agent punched a return limit in the margin, which rendered the ticket useless except for continuous passage back to the point of origin. Not observing this limitation, the passenger stopped over, and upon presenting the ticket at that point the agent marked it "Void," thus compelling the holder to purchase a ticket from that point to his home. He arrived there within the time limit under which the original ticket was sold, having traveled also over the route named in the tariff and otherwise complied with its conditions: *Held*, That the holder was entitled to a refund of the excess fare paid on account of the carrier's error, each of the carriers to reserve the earnings due it under the round-trip ticket. (See rulings 113, 167, and 277.)

**267. GRAIN-DOOR ALLOWANCES.**—Tariffs authorizing allowances for grain doors do not conform with *Conference Ruling 78* unless they state both the maximum allowance per car and

the maximum allowance per grain door. (See rulings 119, 132, and 360.)

**268. CARRIERS MAY NOT DEFEAT THEIR PUBLISHED THROUGH FARES WITH PARTY RATE TICKETS.**—The tariffs of certain carriers provide a 10-party fare from A to B but no such fare from B to C. Upon inquiry whether it would be legal to ticket a party of ten from A to C on the basis of the party fare from A to B and the individual fares from B to C when such combination makes less than the joint through individual fare from A to C: *Held*, That while a party of ten, acting on their own initiative, would have the right to use the party fare from A to B and to purchase such transportation as is available from B to C, the carriers may not ticket them through from A to C on such a combination and thus defeat their own published through fare. (See *Rules and Regulations Governing Checking of Baggage*, 35 I. C. C., 161.)

**269. PUBLISHED DIVISIONS OF THROUGH RATES TO AND FROM MEXICO.**—The purpose of Rule 72 of Tariff Circular No. 18-A requiring the domestic carriers to publish their divisions of rates to and from Mexico is to give to this Commission definite information as to their lawful earnings and was not intended as a means of exercising any jurisdiction over carriers in Mexico. (See rulings 209 and 372.)

**270. DERRICK AND SIMILAR CONSTRUCTION CARS ARE NOT ORDINARILY SUBJECT TO DEMURRAGE CHARGES.**—In the absence of specific tariff provision therefor demurrage does not accrue on derrick cars, pile-driver cars, and similar cars that are not and ordinarily can not be unloaded, when owned or leased by a contractor doing construction work on the line of the carrier concerned, or when standing upon storage tracks. (Qualifying ruling 222; see also ruling 123.)

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*March 8, 1910.*

**271. DESTRUCTION OF DOCUMENTS.**—The regulations of the Commission respecting the preservation and destruction of the records and documents of common carriers also apply to the records and documents of all joint agencies maintained by or on behalf of carriers subject to the act.

*March 14, 1910.*

**272. EXCURSION OF COMMERCIAL ASSOCIATION AT EXPENSE OF CARRIER.**—The Commission can not sanction a proposed interstate excursion for certain commercial clubs, the members of which are to be carried at the expense of the railroad company and as its guests.

*March 15, 1910.*

**273. SHIPMENT TRANSFERRED IN TRANSIT FROM ONE LARGER CAR TO TWO SMALLER CARS.**—For a through shipment of an emigrant outfit the initial carrier, at the request of the consignor, furnished a 40-foot car which became out of order while on its line. At the junction point the connecting carrier transferred the shipment into two 36-foot cars, and in that form it moved to destination on the line of a third carrier. There was no joint through rate but the second and third carriers maintained a rate for a 36-foot car, all weight in excess of a given minimum to be charged for proportionately, the tariff, however, expressly forbidding the use of larger equipment. At destination charges were collected on the basis of two carloads from the point of transfer: *Held*, That in transferring the shipment, the connecting carrier ought to have loaded the full minimum weight into one car and to have adjusted the charges on the balance of the shipment in the second car at the less-than-carload rate. (Compare ruling 357.)

**274. LARGER CAR FURNISHED AT CONVENIENCE OF INITIAL LINE UNDER TARIFF AUTHORITY FOR APPLYING THE MINIMUM ON THE SMALLER CAR ORDERED, CONNECTING LINE NOT PUBLISHING SUCH PROVISION.**—(a) Complaints of alleged overcharge arise in connection with shipments that move over the lines of two or more carriers under combination rates, the initial having a provision in its tariff that in case a car of certain dimensions or capacity is ordered by a shipper, and the carrier for its own convenience furnishes a larger car, such larger car may be used on the basis of the minimum weight applicable to the car ordered, while the connecting carrier does not have such tariff provision and therefore charges for the full minimum weight applicable to the car used. (See rule 66 of Tariff Circular 18-A.)

(b) The law imposes upon carriers the obligation of arranging to every reasonable extent for through carriage and through shipment. Neither the burden of following his shipment to a connecting point between two carriers and there transferring it, nor of bearing the expense of such transfer, can be laid upon the shipper. It is not deemed reasonable that in a case of this kind the shipper should be required to pay higher charges than he would have paid had the initial carrier furnished the equipment that is provided for in its tariff and that was ordered by the shipper. The carriers in the different classification territories ought to have, and should provide at the earliest practicable moment, a uniform rule on this subject.

(c) It is believed that where the initial carrier provides in its tariffs that if for its own convenience it furnishes a car larger than that ordered by the shipper, it will be used upon the basis of minimum weight applicable to the car ordered, and the connecting carrier to or over whose lines such shipment is moved has not such provision in its tariff, the initial carrier should note upon the bill of lading and upon the way bill or transfer bill, which accompanies delivery of a shipment to its connections, the fact that car of certain size was ordered and car of certain size for its own convenience furnished by the carrier to be used on the basis of the minimum weight applicable to the car ordered and that connecting carrier, receiving such notice on the way bill or transfer bill and not having provision in its tariff which permits the use of the car on the basis of the lower minimum weight, should transfer the shipment into car of the size or capacity ordered by the shipper or into car to which the same minimum weight applies, without additional expense to the shipper.

This ruling outlines the policy which the Commission will follow in cases of this nature which may be brought before it. It is, of course, understood that shipper may not demand any car that is not provided for in the initial carrier's tariff. (See ruling 339; also *Gisholt Machine Co. v. C. & N. W. Ry. Co.*, U. R. Op. A-618.)

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*April 4, 1910.*

**275. HOURS OF SERVICE LAW—TRAIN BAGGAGE-MEN.**—The provisions of section 1 of the hours of service law

apply to train baggagemen who are employees of the railway company and who are required by the rules of the company to perform or to hold themselves in readiness, when called upon, to perform any duty connected with the movement of any train. (See rulings 74 and 287.)

**276. DEMURRAGE CHARGES—TARIFF AUTHORITY THEREFOR.**—A consignor while loading cars at the point of origin detained them for several days before they were billed out for movement to interstate destinations. The initial carrier issued a tariff providing for demurrage, but the tariff naming the rate applicable on the movements neither provided demurrage charges nor referred to the initial carrier's tariff where such charges were specified: *Held*, That there was sufficient tariff authority for the collection of the charges by the initial carrier.

**277. ERROR IN THE ISSUANCE OF PASSENGER TICKETS.**—The Commission adheres to its formerly expressed view that connecting lines are entitled to divisions according to the transportation which they honor on presentation by the traveler, and therefore that a carrier whose agent had made an error in not properly punching half-fare and lower-class tickets must bear the full burden of the mistake. (See rulings 69, 113, 167, 247, 266, and 481.)

**278. FREE TRANSPORTATION TO TRAVELING SECRETARIES OF Y. W. C. A.**—Under the provisions of the act free or reduced rate transportation may not lawfully be accorded to traveling secretaries of a Young Woman's Christian Association.

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*April 5, 1910.*

**279. APPLICATION OF RATES ON ARTICLES SOLD UNDER TRADE NAMES.**—A compound described under its technical chemical name in the tariff carrying the rate is offered for shipment and sold by a manufacturer under a trade name: *Held*, That while the packages may bear the trade name of the article, the shipper is not entitled to the rate applicable on the specified compound unless the packages, as tendered for transportation, are also labeled so as to indicate that they contain the compound.

**280. ESTIMATED WEIGHTS PER PACKAGE.**—Sometimes a transportation rate is stated to be a certain sum per package, and sometimes the rate is stated in cents per 100 pounds, and it is provided that the package will be taken at a stated estimated weight. Changes in size or dimensions of packages and disagreements as to the size or dimensions upon which the estimated weight was fixed have caused troublesome complications. In so far as, and whenever, it is practicable, the size and dimensions of such packages should be clearly and accurately described and defined in the tariff.

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*April 11, 1910.*

**281. A CONCURRENCE BY ONE CARRIER IN THE TARIFFS OF ANOTHER DOES NOT LEGALIZE THE USE BY THE FORMER OF THE LOCAL RATES OF THE LATTER.**—A tariff published by one carrier in addition to certain joint through rates also named local rates between two points on its line that were also served by the lines of another and concurring carrier: *Held*, That the local rates of the carrier that published the tariff could not be recognized as the rates of the concurring carrier on local movements between the two points in question.

**282. JOINT RATE REDUCED TO THE SUM OF THE LOCALS, MINIMUM WEIGHT BEING INCREASED.** (Rescinded by ruling 338.)

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*May 10, 1910.*

**283. DRAYAGE CHARGE RESULTING FROM MISROUTING.**—Modified and restated in ruling 509.

**284. INTERPRETATION OF MISROUTING RULING NO. 214.** (Superseded by ruling 316.)

**285. FREE TRANSPORTATION FOR THE REMAINS OF AN EX-EMPLOYEE.**—The Commission finds no warrant in law for holding that free transportation may be accorded to the remains of an ex-employee of a carrier who resigned from the service some time prior to his death. (Compare ruling 193.)

**286. ADJUSTMENT OF CLAIMS FOR DAMAGES RESULTING FROM THE MISROUTING OF FREIGHT.**—(a) The Commission holds that it has exclusive jurisdiction over claims for damages arising from the misrouting of freight. (See rulings 139 and 214.)

(b) The statute of limitations embodied in section 16 of the act to regulate commerce, as amended, governs misrouting claims, and thereunder the Commission is without jurisdiction to take cognizance of claims presented more than two years after the delivery of shipments at destination. (See ruling 139; also *Phillips v. Grand Trunk Ry.*, 236 U. S., 662.)

(c) If a connecting line accepts a shipment at the junction point without routing instructions, it will be held responsible for any excessive charges that may directly accrue from its error in forwarding the shipment to destination via any other than the cheapest available route. (Amending rulings 137 and 199. See *Duluth & Iron Range R. R. Co. v. C., St. P., M. & O. Ry. Co.*, 18 I. C. C., 485; and *American Lumber & Export Co. v. A., T. & N. R. R. Co.*, 42 I. C. C., 260.)

(d) (Restated in ruling 509.)

(e) The Commission will exercise jurisdiction to award damages as against the carrier guilty of misrouting to the extent of the additional cost thus imposed on the delivering carrier.

(f) (Amended and restated in ruling 474c.)

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*March 16, 1908.*

**287. THE HOURS OF SERVICE LAW.**—(a) The provisions of this act apply to all common carriers by railroad in the District of Columbia, or in any Territory of the United States, or engaged in the movement of interstate or foreign traffic; and to all employees of such common carriers who are engaged in or connected with the movement of any train carrying traffic in the District of Columbia, or in any Territory, or carrying interstate or foreign traffic. (See ruling 56.)

(b) Sec. 2. The requirement for ten consecutive hours off duty applies only to such employees as have been on duty for sixteen consecutive hours. The requirement for eight consecutive hours in the aggregate out of a twenty-four hour period. Such duty sixteen consecutive hours but have been on duty sixteen

hours in the aggregate out of a twenty-four hour period. Such twenty-four hour period begins at the time the employee first goes on duty after having had at least eight consecutive hours off duty. The terms "on duty" includes all the time during which the employee is performing service or is held responsible for performance of service. An employee goes "on duty" at the time he begins to perform service, or at which he is required to be in readiness to perform service, and goes "off duty" at the time he is relieved from service and from responsibility for performance of service. (Qualified by ruling 74.)

(c) The act does not specify the classes of employees that are subject to its terms. All employees engaged in or connected with the movement of any train, as described in section 1, are within its scope. Train dispatchers, conductors, engineers, telegraphers, firemen, brakemen, train baggagemen, who, by rules of carriers, are required to perform any duty in connection with the movement of trains, yardmen, switch tenders, tower men, block-signal operators, etc., come within the provisions of the statute. (Qualified by rulings 108 and 275; see also ruling 88.)

(d) The proviso in section 2 covers every employee who, by the use of the telegraph or telephone, handles orders pertaining to or affecting train movements. In order to preserve the obvious intent of the law this provision must be construed to include all employees who, by the use of an electrical current, handle train orders or signals which control movements of trains. (See ruling 88.)

(e) The prime purpose of this law is to secure additional safety by preventing employees from working longer hours than those specified in the act. Therefore a telegraph or telephone operator who is employed in a night and day office may not be required to perform duty in any capacity or of any kind beyond nine hours of total service in any twenty-four hour period. (See *United States v. G. R. & I. Ry. Co.*, 224 Fed. Rep., 667.)

(f) The phrase "towers, offices, places, and stations" is interpreted to mean particular and definite locations. The purpose of the law and of the proviso for nine hours of service may not be avoided by erecting offices, station, depots, or buildings in close proximity to each other and operating from one a part of the day while the other is closed and vice versa.

The statute is remedial in its intent and must have a broad construction so that the purpose of the Congress may not be defeated.

(g) The Commission interprets the phrase "continuously operated night and day" as applying to all offices, places, and stations operated during a portion of the day and a portion of the night, a total of more than thirteen hours.

The phrase "operated only during the daytime" refers to stations which are operated not to exceed thirteen hours in a twenty-four hour period, and is not considered as meaning that the operator thereat may be employed only during the daytime.

(h) The act provides that operators employed at night and day stations or at daytime stations may, in case of emergency, be required to work four additional hours on not exceeding three days in any week. Manifestly, the emergency must be real and one against which the carrier can not guard.

"In any week" is construed to mean in any calendar week, beginning with Sunday.

(i) (The Commission decided in conference on April 9, 1917, to rescind this paragraph because the question upon which it was made has since been judicially interpreted and is now pending in the courts upon appeal.)

(j) It will be noted that the penalties for violation of this act are against the "common carriers, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty," in violation of the law. It is clear that the officers and agents of carriers who are liable to the penalties provided in the act are those who have official direction or control of the employees; and that the penalties do not attach to the employees, who, subject to such supervision or control, perform the service prohibited.

(k) Sec. 4. To enforce this act the Interstate Commerce Commission has all the powers which have been granted to it for the enforcement of the act to regulate commerce, including authority to appoint employees, to require reports, to examine books, papers, documents, to administer oaths, to issue subpoenas, and to interrogate witnesses.

*October 3, 1910.*

**288. COMPETENCY OF RAILROAD EMPLOYEES—CONDITION OF SIGNAL DEVICES.**—Upon inquiry: *Held*, That, except in cases of accident, the Commission has no authority under the act to regulate commerce to look into the competency of railroad employees or the physical condition of block signals, and makes no general investigations of that nature.

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*October 4, 1910.*

**289. POSTING NAMES OF RESIDENT AGENTS AT BLIND SIDINGS.**—The act requires a carrier to post the name of its resident agent in every office, warehouse, depot, or station building at which freight is received. But upon inquiry: *Held*, That this is not necessary at blind sidings where there is no station agent or any station building at which freight is received. (See ruling 86.)

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*October 10, 1910.*

**290. STATEMENT OF SEX OF CHILDREN ON APPLICATIONS FOR PASSES.**—Upon inquiry by a carrier whether under *Conference Ruling 95* it is necessary that applications by one carrier on another for exchange transportation should show the sex of the child or children for whom free transportation is requested: *Held*, That an application in behalf of "John Smith and children" is not a sufficient compliance with the rule; it should be made in the name of "John Smith, one son, and two daughters," so that the representation that they are the children of the person named may affirmatively appear.

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*October 11, 1910.*

**291. PARAGRAPH 5 OF SECTION 15 OF THE AMENDED ACT DOES NOT APPLY TO TELEGRAPH COMPANIES.**—Upon inquiry: *Held*, That the paragraph of section 15 of the amended act to regulate commerce giving the shipper the right to route his shipment does not apply to telegraph companies. (Also see Routing.)

November 7, 1910.

**292. ALLOWANCES FOR FLOOR RACKS IN REFRIGERATOR CARS ANALOGOUS TO GRAIN-DOOR ALLOWANCES.**—Certain carriers filed tariffs providing that when refrigerator cars without floor racks are set for loading, and shippers are required to furnish floor racks to protect the freight loaded, allowances will be made equal to the cost of the rack, but not to exceed \$2.50 per car. The question of the lawfulness of such tariffs being under consideration: *Held*, That the principle involved is the same as that relating to grain doors furnished by shippers. (See rulings 19, 78, 132, 267, and 360.)

**293. RATES OR FARES PUBLISHED SUBSEQUENT TO FEBRUARY 17, 1911, IN VIOLATION OF SECTION 4 AS AMENDED.**—Subsequent to February 17, 1911, any rate, fare, or charge maintained or imposed in violation of the long-and-short-haul provision of the fourth section of the act as amended, which rate, fare, or charge is not covered by an order of the Commission granting relief from the provisions of the section, or by pending application for such relief, will be held not to be brought into conformity with said section by a change in classification; cancellation of commodity rate leaving class rate or combination rate to apply; cancellation of a rate with provision that in lieu thereof a rate in some other tariff shall apply; correction of error in tariff; addition or elimination of routes without change in list of participating carriers; or by any other change which does not leave the rate, fare, or charge free from conflict with the law. (See rulings 299, 304, 318.)

**294. TRANSPORTATION FROM FOREIGN COUNTRIES NOT ADJACENT THROUGH THE UNITED STATES TO AN ADJACENT FOREIGN COUNTRY.**—(Withdrawn November 11, 1912; see *Seymour v. M. L. & T. R. R. & S. S. Co.*, 35 I. C. C., 492.)

**295. RATES BASED ON VALUE OF MERCHANDISE.**—Carriers may lawfully establish schedules of charges applicable to a specific commodity and graduated reasonably according to value. When such rates are published shippers are entitled to the rate corresponding to the actual value of the property offered by them for transportation. Shippers are not entitled un-

der such rates to understate the actual value of shipments for the purpose of obtaining the rate applicable upon articles of less value. The valuation stated to carriers should correspond with the actual value as shown by invoices, etc. Shippers misstating the value of property for the purpose of obtaining the rate applicable to property of less value are guilty of misbilling and are subject to prosecution under section 10 of the act to regulate commerce. (See ruling 58; compare ruling 188; see also *The Cummins Amendment*, 33 I. C. C., 696; and *Express Rates, Practices, Accounts, and Revenues*, 43 I. C. C., 510.)

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November 8, 1910.

**296. POWER TO REQUIRE ADDITIONAL PASSENGER TRAIN SERVICE.**—(a) Upon complaint of a resident at a suburban station that sufficient trains are not run to and from New York City during the morning and evening hours to accommodate commuters: *Held*, That the Commission is without authority to require the running of additional trains.

(b) Upon complaint of the discontinuance of a daily accommodation train between Washington and a rural community 27 miles distant, *Held*, That the Commission is without power to grant relief.

**297. FREE AND REDUCED RATE TRANSPORTATION OF PERSONS TRAVELING AT THE EXPENSE OF STATE OR TERRITORIAL GOVERNMENTS.**—*Conference Ruling 218* is confined to movements at the instance and expense of the United States. The Commission finds nothing in the law authorizing free or reduced rate transportation of persons, other than indigents, traveling at the expense of a state or territorial government. (See ruling 208-e and 452.)

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November 14, 1910.

**298. THROUGH FARES HIGHER THAN THE COMBINATION OF INTERMEDIATE FARES.**—Upon inquiry whether the prohibition against charging a greater compensation as a through charge than the aggregate of the intermediate charges subject to the provisions of the act is to be construed as meaning that fares must be made not higher than the lowest pos-

sible combination of intermediate fares, and if not, upon what basis they may be constructed: *Held*, That the fares must be constructed upon the basis of being no higher than the lowest combination of fares that are published and filed as available for interstate travel or in making up interstate fares. If a carrier desires to exclude from this consideration any of its purely intrastate fares it must refrain from publishing and filing such intrastate fares as available for use in making up interstate fares. (See *United States v. N., C. & St. L. Ry.*, U. R. Op. A-691; and *United States v. B. & O. R. R. Co.*, 15 I. C. C., 470.)

December 17, 1910.

**299. APPLICATION OF SECTION 4, AS AMENDED JUNE 18, 1910, TO EXPORT AND IMPORT RATES.**—(a) Inland export and import rates are subject to the provisions of the act and within the jurisdiction of the Commission.

(b) The fourth section of the amended act forbids carriers subject thereto, without authority from the Commission in accordance with said section, to charge more for the transportation of a like kind of export or import traffic for a shorter than for a longer haul over the same line in the same direction; that is, as we understand the law, the validity of a rate under this section is determined by comparison of an export rate with an export rate, or an import rate with an import rate.

(c) So far as the fourth section is concerned, carriers are not required in the first instance to establish export and import rates which shall be measured and limited by domestic interstate rates between the same points of origin and destination in the United States; but as export and import rates, as well as domestic interstate rates, are subject to the provisions of the act and the jurisdiction of the Commission, it is clear that the reasonableness of any of these rates under the provisions of section 1, and questions of discrimination under the third section, may all be considered and the Commission may condemn any discrimination in export and import rates, upon comparison with those applicable on domestic interstate traffic, to the extent that the same may be found unjust or unreasonable in any particular case upon investigation and full hearing.

(Section 4 as amended is also interpreted in rulings 293, 304, 318. See *Import Rates on Manganese Ore*, 12 I. C. C., 666.)  
*January 14, 1911.*

**300. BROKERAGE CHARGES BY EXPRESS COMPANIES ON SHIPMENTS FROM ABROAD.**—A suit case consigned from London in care of an express company at New York City for further transportation inland by express was appraised by the customs officials, with its contents, at the sum of \$363. Upon complaint of a charge of \$3 exacted by the express company for its services in clearing the shipment through the customs house, no scale of such charges being filed with this Commission, it was *Held*: That brokerage charges of this nature are not within the jurisdiction of the Commission, not being a part of the transportation service. (See rulings 7, 221, 300, and 444.)

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*February 13, 1911.*

**301. EMPLOYEES ON PRIVATELY OWNED OR CHARTERED CARS.**—Upon inquiry: *Held*, That porters, cooks, or waiters on privately owned or chartered cars moving under tariff authority may be carried as employees.

**302. TELEGRAMS RELATING TO SHIPMENTS.**—Telegraphic instructions or inquiries made by shippers to or of a carrier in relation to their shipments may not properly be paid for by the carrier unless so provided in its published tariffs; a telegram sent by the carrier to the shipper relating to his traffic, and his reply thereto, pertain to the business of the carrier and may be sent at its expense. (Construed by rulings 327 and 351; see rulings 363, 480.)

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*February 22, 1911.*

**303. REDEMPTION OF TICKETS.**—Under appropriate provision in its tariffs a carrier may redeem the unused portion of a round-trip ticket on the basis of a lower round-trip fare to a point directly intermediate, provided the latter fare was lawfully available for the journey as actually commenced and concluded; or it may, under a tariff provision to that effect, exchange a round-trip ticket to a point directly intermediate for

a round-trip ticket available at the same time to a more distant point, upon collecting the difference in the fares of the two tickets. (Affirming ruling 265; see also rulings 76, 115.)

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March 13, 1911.

**304. APPLICATION OF SECTION 4 AS AMENDED JUNE 18, 1910.**—(a) The fourth section applies to all rates and fares, but in determining whether its provisions are contravened rates and fares of the same kind should be compared with one another; that is, transshipment rates should be compared with transshipment rates; proportional rates with proportional rates; excursion fares with excursion fares; and commutation fares with commutation fares. It would not be in violation of the fourth section, for instance, if a proportional rate to or from a given point were lower than the regular rate to or from an intermediate point, nor if the commutation fare to or from a more distant point were lower than the regular fare to or from an intermediate point. (Rulings 309, 310. See *Southern Illinois Millers Asso. v. L. & N. R. R. Co.*, 23 I. C. C., 673; and *Rates on Grain and Grain Products to Texarkana, Ark.*, 29 I. C. C., 36.)

(b) A proportional rate is defined as one which applies to part of a through transportation which is entirely within the jurisdiction of the act to regulate commerce; that is, the balance of the transportation to which the proportional rate applies must be under a rate filed with this Commission. A rate to a port for shipment beyond by a water carrier not subject to the provisions of this act would not be a proportional rate. (See *Crescent Coal & Mining Co. v. C. & E. I. R. R. Co.*, 24 I. C. C., 155.)

The foregoing holding is not intended to approve the lawfulness of any existing transshipment rate.

(c) An excursion rate is one which provides for a return to the initial point or some corresponding point.

(d) Where from the absorption of a switching charge it results that the total transportation charge from a more distant point to the point where the property is delivered is less than the total transportation charge from or to an intermediate point the fourth section is violated. Owing, however, to the very gen-

eral practice of absorbing switching charges from competitive and not from noncompetitive stations, and in view of the fact that much benefit and little complaint results, the Commission will, by general order, permit a continuance of this practice, reserving for consideration and determination individual cases which may require special consideration. (Such an order was entered March 20, 1911.)

(e) If a carrier has been given authority to maintain from or to noncompetitive intermediate points rates higher than those from or to more distant competitive points and a new intermediate station is opened, rates from or to such intermediate station which are the same or in harmony with those authorized may be established by the carrier without special authority from the Commission.

(f) If a carrier is authorized to maintain rates to or from a given point which are not in conformity with the fourth section, it may establish rates upon branch lines connecting with the main line at these points which are higher than such intermediate rates by arbitraries or by the branch-line locals, without special authority from the Commission.

(Section 4 as amended is also interpreted in rulings 293, 299, 318.)

**305. APPLICATION OF THE AMENDED ACT TO TELEGRAPH AND TELEPHONE COMPANIES.**—(a) Each and every telegraph and telephone company which transmits messages over its line or lines from a point in one state, territory, or district of the United States to any other state, territory, or district of the United States, or to any foreign country, is subject to the provisions of the act.

(b) If a telegraph or telephone company, the line of which is wholly within a single state, territory, or district of the United States, receives a message within such state, territory, or district of the United States, for transmission to a point without the state, territory, or district of the United States, which it transmits over its line to another point in the same state, territory, or district of the United States and there delivers it to an interstate line for transmission to destination, the first-named company by virtue of its participation in this transaction, is not made subject to the provisions of the act; unless there be an

arrangement between that company and its connection for through continuous transmission of such messages, in which latter case all of the participating companies in such through continuous transmission are subject to the provisions of the act.

(c) If two or more lines are connected so that a person within one state, territory, or district of the United States talks with a person at a point without such state, territory, or district of the United States, or so that a message is transmitted directly from a point within a state, territory, or district of the United States to a point without the same, the transmission of messages in this manner constitutes interstate commerce and brings all of the participating lines within the purview of the act.

(d) It follows that telegraph and telephone companies subject to the act, as above indicated, must conform to the provisions of section 1 thereof, requiring that all of their rates and charges for the transmission of interstate messages shall be reasonable and just, and that such companies may lawfully issue franks covering free interstate service or may grant free interstate service to the same extent, and subject to the same limitations as other common carriers under the provisions of said section. (See rulings 95a, par. 2, 161, 219, and 364.)

(e) Such telegraph and telephone companies subject to the act are also governed by the provisions of section 3 forbidding any undue or unreasonable preference or advantage by rebates or otherwise, or any undue or unreasonable prejudice or disadvantage in any respect whatsoever, and are subject to the lawful orders of the Commission made pursuant to the provisions of section 15 of the act, and also of section 20 thereof respecting the keeping of accounts and memoranda and the making of reports to the Commission.

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*April 3, 1911.*

**306. STATUTE OF LIMITATIONS NONOPERATIVE AS BETWEEN CARRIERS.**—Before the expiration of two years a delivering line discovered and at once refunded an overcharge; upon demand made by it after the two years had expired a connecting line declined to repay its share, on the ground that the statute had run: *Held*, That in such cases the statutes does not run as between carriers. (See rulings 10, 220j, and 307.)

**307. CLAIMS BARRED BY THE STATUTE OF LIMITATIONS.**—Overlooking a higher through rate, charges were collected on the sum of the intermediate rates. After two years had expired the through rate was reduced to that basis and still later the balance of the through rate legally in effect on the date of the shipment was collected. Upon presentation of the claim some months later: *Held*, That it was barred by the statute, and that the case is controlled by *Blinn Lumber Co. v. S. P. Co.*, 18 I. C. C., 430. (See rulings 10, 220j, 306, and 508.)

**308. USE OF FREE TRANSPORTATION BY RAILROAD EMPLOYEE WHILE CONNECTED WITH MUNICIPAL OFFICE.**—Upon inquiry: *Held*, That a railroad employee on leave of absence for the purpose of filling a term in a public office, or to engage in other business, is not entitled during such period to free passes either for himself or his family. (See ruling 208d.)

**309. PASSENGER FARES UNDER THE FOURTH SECTION.**—*Held*, That carriers may not disregard the fourth section in order that passenger fares may be stated in multiples of five. (See ruling 304a.)

**310. PASSENGER FARES UNDER THE FOURTH SECTION.**—*Held*, That in determining whether the provisions of the fourth section are contravened, mileage, commutation, party rate, and half fares for children should be compared only with fares of the same character. (See ruling 304a.)

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*April 4, 1911.*

**311. FREE TRANSPORTATION OF PROPERTY FOR COUNTY AUTHORITIES.**—(Restated in ruling 452.)

**312. TERMINAL COMPANIES SUBJECT TO ACT.**—Upon inquiry: *Held*, That terminal companies must file statistical reports as required by the Commission.

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*April 10, 1911.*

**313. DEMURRAGE RULES.**—(See Code of National Car Demurrage Rules indorsed by the Commission January 17, 1916.)

*May 1, 1911.*

**314. COLLECTION OF UNDERCHARGES.**—The law requires the carrier to collect and the party legally responsible to pay the lawfully established rates without deviation therefrom. It follows that it is the duty of carriers to exhaust their legal remedies in order to collect undercharges from the party or parties legally responsible therefor. It is not for the Commission, however, to determine in any case which party, consignor or consignee, is legally liable for the undercharge, that being a question determinable only by a court having jurisdiction and upon the facts in each case. (Superseding rulings 3 and 187. See also rulings 16 and 156 and *Y. & M. V. R. Co. v. Zemurray*, 238 Fed., 789.) See interpretation ruling 515.

**315. USE OF INTRASTATE MILEAGE BOOKS ISSUED IN EXCHANGE FOR ADVERTISING.**—A state statute permits the exchange of intrastate mileage books for advertising. Upon inquiry: *Held*, That such books may not be used upon any part of an interstate journey. (See *C., I. & L. Ry. Co. v. United States*, 219 U. S., 486.)

**316. CONFERENCE RULING 284 SUPERSEDED.**—Upon inquiry as to the application of *Conference Rulings 190 and 214* to routes made up partly of a car ferry: *Held*, That routes involving the transshipment of freight from a rail line to a water line or from a water line to a rail line are "rail-and-water routes," and that routes composed of rail lines connected by car ferries over which the freight is ferried in the car constitute "car-ferry routes" and are understood to be included in the general term "all-rail." (See *Hollingshead & Blei v. P. & L. E. R. R. Co.*, 18 I. C. C., 193.)

*Held further*, That where a shipper does not specify a particular route or a rail-and-water route, the carrier's agent must consider car-ferry routes as available in performing the duty of routing a shipment over the cheapest route. (See ruling 190, interpreting ruling 214.)

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*May 2, 1911.*

**317. ERRORS IN TRANSMISSION OF TELEGRAPHIC MESSAGES.**—Upon inquiry: *Held*, That the Commission has

no jurisdiction over claims for damages due to alleged errors in the transmission of telegraphic messages. (See *Unrepeated Message Case*, 44 I. C. C., 670.)

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*May 8, 1911.*

**318. APPLICATION OF FOURTH SECTION WHEN ONE OR MORE POINTS ARE IN A FOREIGN COUNTRY.**—The fourth section does not apply when the more distant point and the intermediate point are in a foreign country; nor when the point of origin and point of destination are both in the United States and the intermediate point is in a foreign country. (See rulings 293, 299, 304, and 447.)

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*June 2, 1911.*

**319. FREE TRANSPORTATION OF WITNESSES.**—Upon inquiry: *Held*, That a carrier may not lawfully issue free interstate transportation to one not otherwise entitled to it in order to enable him as a witness to attend a proceeding in court unless the carrier is a party thereto or has a direct legal interest in the result. (See ruling 414.)

**320. FREE TRANSPORTATION OF INSTRUCTOR IN USE OF BOILER COMPOUND.**—(Overruled by ruling 336. See ruling 169.)

**321. SHIPPER MAY DIRECT TERMINAL ROUTING.**—In view of the amendment to section 15 of the act, paragraph *b* of *Conference Ruling No. 214* is now amended so as to read as follows:

(*b*) In order to secure desired delivery to industries, plants, or warehouses and avoid unnecessary terminal or switching charges, the shipper may direct as to terminal routing or delivery of shipments which are to go beyond the lines of the initial carriers; and his instructions as to such terminal delivery must be observed in routing and billing such shipments. When shipments are accepted without specific routing instructions from shipper, where all-rail rates and rail-and-water rates are available, the carrier's agent must have the shipper designate which of the two he wishes to use. Carriers will be held responsible for routing shown in bill of lading. (See rulings 190 and 316.)

**322. SUSPENSION OF TARIFF SCHEDULES.**—The authority conferred on the Commission by the amendatory act of June 18, 1910, to suspend schedules stating new individual or joint rates, fares, or charges, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, was not intended to withdraw from carriers the right to initiate their rates, fares, charges, and regulations and does not mean that in every case of advanced rates or charges the schedules should be suspended. The statute vests a discretion in the Commission in that regard and contemplates that it will be exercised in a judicial spirit. Except in cases where it acts on its own initiative the Commission will not ordinarily suspend the operation of a schedule unless the changes complained of are called to its attention at least 10 days before the effective date of the schedule, thus giving the Commission time in which to act intelligently and to avoid discriminations that might result from the improper suspension of a schedule.

Requests for such action by the Commission should be made in the form of a complaint indicating the schedule by its I. C. C. number and specifically referring to the parts thereof as to which suspension is asked, together with reasonably detailed explanations as to the probable effect of the proposed new rates, fares, etc.

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*June 8, 1911.*

**323. OFFSETTING OF UNDER OR OVER CHARGES.**—It appearing that some confusion has been caused by the Commission's *Conference Rulings Nos. 48, 133*, and its ruling of February 14, 1911, the following is issued in lieu of the three rulings above mentioned:

The Commission has no authority to control the disposition of an overcharge. The carrier must charge no other than its lawful rate and the failure to collect the full rate as to any shipment is a violation of the law, as is the collection of more than the full rate. The Commission declines to declare that an overcharge may be offset as against an uncollected undercharge; such offset is not within the power of the Commission to authorize or condemn. (See *Illinois Cent. R. Co. v. W. L. Hoopes & Sons*, 233 Fed. Rep., 135.)

*June 19, 1911.*

**324. DIVISIONS ON COMPANY COAL.**—Upon inquiry: *Held*, That it is unlawful for carriers to make special and discriminatory divisions of joint rates upon locomotive fuel as between an originating or participating carrier and a purchasing carrier. In the division of joint rates a railroad must be treated precisely as any other shipper is treated, and the Commission will regard any special division as a device to defeat the published rate. All divisions upon fuel coal must be made in good faith without respect to the fact that one of the carriers is the purchaser of such coal. (See order if one of the carriers is the purchaser of such coal.) (See *Rates on Railroad Fuel and Other Coal*, 36 I. C. C., 1, and order in *Divisions of Joint Rates on Railway Fuel Coal*, 37 I. C. C., 265; also ruling 486.)

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*June 20, 1911.*

**325. LEASE OF LAND BY SHIPPER FROM A CARRIER AT NOMINAL RENTAL UNLAWFUL.**—Under a lease in which a nominal rental is reserved a private person has erected a grain elevator upon land belonging to an interstate carrier: *Held*, That the arrangement constitutes an undue preference. (See rulings 94 and 421.)

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*October 9, 1911.*

**326. BAGGAGE CHECKED BY INITIAL LINE WITH ROUTING INADEQUATELY SPECIFIED.**—Upon inquiry as to the legal propriety of a proposed agreement by an association of general baggage agents providing, in substance, that an intermediate line shall forward to checked destination by the most direct route any baggage received by it not fully routed; that the initial line shall report to the lines actually moving the baggage the amount of any excess baggage charges collected by it; and that in case there is more than one station at destination the initial as well as the terminal line shall be advised of the station at which the baggage may be found, it was, *Held*, That subject to such modified conclusions as may be required in the light of further information, the Commission sees no present objection to such rules if properly published in the tariffs.

*October 10, 1911.*

**327. TELEGRAMS RELATING TO SHIPMENTS—RULING 302 CONSTRUED.**—Telegrams from a shipper relating to his traffic must be paid for by him, but a carrier may lawfully answer such a message at its expense. (See rulings 302, 351, 363, and 480.)

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*November 6, 1911.*

**328. SAFETY APPLIANCES—CARS OF SPECIAL CONSTRUCTION.**—Locomotives while equipped with snowplows or flangers are to be regarded as cars of special construction within the meaning of the order of March 13, 1911.

**329. SAFETY APPLIANCES—ORDER OF MARCH 13, 1911, CONSTRUED.**—The order entitled "United States Safety Appliance Standards," adopted on March 13, 1911, is interpreted with respect to the details mentioned as follows:

1. That gondola and ballast cars with swinging side doors at ladder locations may be considered as cars of special construction.

Ladders and handholds need not be applied to swinging side doors.

A side vertical handhold shall be placed on corner post of such cars, as nearly as possible over sill step.

2. That high-side gondola and ballast cars with end platforms 18 inches or more in length may be considered as cars of special construction.

Ladders shall be placed on such cars as prescribed for high-side gondola and hopper cars, with sill step under ladder, or as near under ladder as car construction will permit. Ends and side of cars to be equipped with handholds in the same manner as flat cars.

3. Ladders—spacing of ladder treads. That the spacing of top ladder treads shall be taken from eave of roof at side of car, whether latitudinal running board is used or not. (Shown on plates illustrating United States States safety appliance standards, issued by the Commission July 1, 1911.)

4. Box and other house cars—automobile cars with swinging end doors—end ladders:

That these cars may come under the head of cars of special construction, as per clause on page 37 of the order, and the end ladders placed as nearly as possible to designated location.

*November 14, 1911.*

**330. FREE CARRIAGE OF RAILWAY Y. M. C. A. LIBRARY BOOKS.**—It is not unlawful for an interstate railroad to carry without charge, for use by railway employees, books belonging to the libraries of Railway Young Men's Christian Associations.

**331. TRANSFER OF SHIPMENT IN TRANSIT TO ANOTHER CAR.**—A shipment started to move under a joint through rate and an established minimum for the car of the size in which it was loaded, but for the convenience of the carrier was subsequently transferred into a smaller car taking a lower minimum under the same through rate. Charges were collected on the actual weight, which was in excess of the lower and less than the higher minimum weight: *Held*, That where a joint through rate is in effect the through charges are not affected by such a transfer of the shipment in transit from one car to another whether larger or smaller; and that the through charges here should have been collected at the joint through rate and on the basis of the minimum weight applicable on the car ordered or accepted by the consignor for the movement. (See rulings 273, 274, 339, and 357.)

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*December 11, 1911.*

**332. CARRIERS FAILING TO OBEY ROUTING INSTRUCTIONS LIABLE TO PROSECUTION.**—(Rescinded by ruling 502.)

**333. COMPANY MATERIAL.**—Material for use in the repair of one of its cars was shipped by a carrier to the shop of a connecting line. Upon inquiry whether the material could move free of charge over both roads it was *Held*, That in cases of this kind company material may move without charge only over the line at whose expense the repair is made. (See ruling 373.)

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*January 9, 1912.*

**334. RATES ON GASOLINE MOTOR CARS MOVING UNDER THEIR OWN POWER.**—The movement of a gasoline

motor car, from the manufacturer to the purchaser, over the rails of a common carrier is transportation that is subject to the act, when between interstate points, notwithstanding the fact that it moves under its own power and is operated by employees of the manufacturer. Such transportation is lawful only when a rate for it has been duly published. Except on the commodities specifically enumerated in section 1 of the act, rates can not lawfully include the passage of attendants, and as gasoline motors cars are not so enumerated the attendants must pay fares on the basis of the regularly published passenger fare then in effect. In adjusting its rates the carrier should take into consideration the conditions surrounding the movement of traffic of this kind.

**335. FREE TRANSPORTATION OF HOUSEHOLD GOODS.**—A bureau of the American Railway Association, known as the Bureau for the Safe Transportation of Explosives, ordered one of its inspectors to permanent duty at another station. *Held*, That the carriers in the route between the two points can not lawfully transport his household goods free of charge, even though they are members of that association.

**336. FREE TRANSPORTATION OF INSTRUCTOR IN THE USE OF BOILER COMPOUNDS.**—Annual passes may not lawfully be issued to or used by employees of companies manufacturing boiler compounds; nor may a carrier transport such persons free of charge when going to or from instruction work on the line of a connection. A carrier using the compound in its locomotive boilers may give free transportation to an expert of the manufacturer whom it desires to send over its own line to instruct its employees in the use of the compound, but only for that purpose and to the extent necessary in the performance of that duty, provided the agent does not sell or solicit orders. (*Overruling Conference Ruling 320. See ruling 346.*)

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*January 15, 1912.*

**337. AGENTS FOR CARRIERS MAY NOT ACT AS AGENTS FOR SHIPPERS.**—At certain docks the stevedores, who are also the loading contractors for a connecting rail line, unload the vessel and load its cargo into the cars, handling a

loading slip to the rail line, upon which the latter issues bills of lading. For the purpose of defeating the through rate, or in such a manner as to have that result, they also act as agents for consignees, and forward to inland rail points goods received by water at the docks and originally intended for such destinations. (See *In re Wharfage Facilities at Pensacola, Fla.*, 27 I. C. C., 258; and *Doran & Co. v. N., C. & St. L. Ry.*, 33 I. C. C., 527.)

Affirming the principle of *Conference Ruling 98*, it is *Held*, That neither a railroad nor its agents or employees may lawfully act as forwarding agents for shippers. (See ruling 365.)

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*February 5 1912.*

**338. JOINT RATE REDUCED TO THE AGGREGATE OF THE INTERMEDIATES, MINIMUM WEIGHT BEING INCREASED.**—A joint rate exceeding the aggregate of the intermediate rates was later reduced to equal their sum, the minimum weight, however, being increased. *Held*, That in such cases reparation, when awarded informally by the Commission, will be on the basis of the newly established joint rate and minimum weight, subject of course to the actual weight when higher than the new minimum. (Rescinding ruling 228.)

**339. TWO SMALL CARS FURNISHED IN LIEU OF A LARGER CAR ORDERED BY THE SHIPPER.**—Upon informal complaints and numerous inquiries it is *Held*, That the act of a carrier in furnishing two small cars in lieu of the larger car ordered by a shipper under appropriate tariff authority is binding, at the rate and minimum applicable to the car ordered, upon all the carriers that are parties to the joint rate under which the shipment moves from the point of origin; the shipper is entitled to all privileges in transit, to reconsignment, and to switching at the same charges as would be applicable under the joint tariff had the shipment been loaded into one car of the capacity ordered; and demurrage will likewise accrue on that basis. If the shipment moves beyond the point to which the joint rates applies, the connecting line or lines are entitled to and should collect their transit, reconsigning, switching, and demurrage charges as provided in their own tariffs.

In all cases the initial carrier will be liable for such additional charges as may be imposed on the shipper by reason of its failure to furnish a car of the capacity ordered. Carriers that are parties to the joint rate under which the shipment commenced to move may share in such additional expense so incurred by the initial carrier.

Rule 66 of Tariff Circular 18-A: *General Chemical Co. v. N. & W. Ry.*, 15 I. C. C., 349; *Conference Ruling 250*; *Milwaukee Falls Chair Co. v. C., M. & St. P. Ry.*, 16 I. C. C., 217; *Conference Ruling 59*; *Noble v. B. & O. R. R.*, 22 I. C. C., 432; and *Conference Ruling 274* reaffirmed, with the understanding, however, that the duty of transferring the shipment rests upon the carriers and not necessarily upon the connecting carrier. (See ruling 357 amending ruling 250.)

**340. RESTAURANT EMPLOYEES AT A UNION STATION NOT ENTITLED TO FREE TRANSPORTATION.**—A restaurant is conducted in a union station primarily for the benefit of the traveling public by a terminal company claiming to be a common carrier within the meaning of the act. Upon inquiry, *Held*, That its employees in the restaurant are not entitled to free transportation. (See ruling 87.)

**341. SWITCHING ROADS—CONCURRENCES.**—Two lines having no direct connection effect an interchange of traffic through a terminal railroad under an arbitrary switching charge of \$3 a car, which they absorb out of the joint rate. Upon inquiry it is *Held*, That it is not necessary that the switching road be shown as concurring in the joint through rate if its tariff of switching charges is on file and the tariff naming the joint through rate provides that such charges will be so absorbed. (See ruling 402.)

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*February 12, 1912.*

**342. HOURS OF SERVICE LAW.**—A trainman required by the rules of the carrier, in conjunction with his duties as trainman, to send, receive, or deliver orders affecting the movement of trains comes within the proviso of section 2 of the hours of service act, and therefore a carrier may not require a trainman, who has been on duty longer than the limit of time fixed for a

telegraph or telephone operator, to send, receive, or deliver orders affecting the movement of trains, as a part of the duties regularly assigned to him.

But upon inquiry whether the practice of requiring conductors of trains delayed at stations where there is no regularly assigned telegraph or telephone operator on duty, and conductors of trains about to be overtaken by superior trains, to telephone or telegraph the train dispatcher for instructions is in accord with the act and with the Commission's order of interpretation of June 25, 1908, *Held*, That a trainman who has been on duty for more than 9 hours or for more than 13 hours is not prohibited from occasionally using the telegraph or telephone to meet an emergency.

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*March 4, 1912.*

**343. ICED REFRIGERATOR CAR NOT USED.**—A refrigerator car set for loading, fully iced, was not used because of weather conditions, and the shipper refused to pay the ice company's bill: *Held*, That while an action may doubtless lie at common law, it is not clear, in the absence of a tariff provision to cover such cases, that the ice charges are collectible under the act.

**344. RATES LAWFULLY CANCELED.**—Upon inquiry, *Held*, That a rate once lawfully canceled may not be reinstated as a reissued item.

**345. FREE TRANSPORTATION.**—The free-pass provision of section 1 is construed as implying that free transportation may be accorded by carriers to Canadian customs and immigration inspectors on duty.

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*March 11, 1912.*

**346. FREE TRANSPORTATION OF INSTRUCTORS.**—In the interest of safety and economy many carriers have adopted certain appliances and methods in the use of which by their employees instruction and supervision are essential to proper results and can only be given by experts. The contracts under which carriers undertake to use such appliances or materials

not infrequently contain provisions requiring the vendor to furnish experts for these purposes and the carrier to transport them over its line free of charge.

The successful use of such appliances or materials makes for the public interest, and upon full consideration of numerous inquiries in the light of more complete information, and differentiating clearly between vendors' expert demonstrators and instructors and other of their agents, it is *Held*, That where a carrier purchases appliances, materials, or supplies, in the use of which instruction and supervision of employees by experts are essential to proper and successful results, it may, in the contract of purchase, undertake to grant free transportation over its own line to such expert demonstrators and instructors as are furnished by the vendor under the contract, to the extent and only to the extent that such transportation is necessary for the performance of their duty on that line; and provided that no such expert so traveling under free transportation shall in any way engage in the sale of goods or in the soliciting or taking of orders therefor: *Held further*, That such experts are not railway employees in the sense that they may be given free transportation to travel over one road or system for the purpose of reaching another road or system to which they may have been assigned upon like duty.

The views expressed in *Conference Ruling No. 208* as to general application of the law are adhered to; *Conference Rulings 134* and *336*, in which the principles of *Conference Ruling 208* are applied, are not to be understood as being modified by anything here said.

**347. ERROR IN STATING CONCURRENCE NUMBER.**—Through inadvertence a tariff showed an erroneous number of a lawful concurrence by a participating carrier: *Held*, That the tariff is not invalidated by a minor error of that character but is a lawful issue, and is binding upon the participating carriers.

**348. FABRICATION OF STRUCTURAL STEEL.**—In making shipments of structural iron and steel the consignor intended to take advantage of the privilege of fabricating the material in transit, but failed to note on the bill of lading as required by the tariff "To be fabricated at ——." As a result of this

omission higher charges accrued: *Held*, That the Commission will not authorize the carrier to refund the additional charges resulting from the shipper's own error. (See *Woodland Lumber Co. v. N. S. R. R. Co.*, 38 I. C. C., 710.)

**349. DESTRUCTION OF RECORDS.**—The sale of documents, records, and papers of an interstate carrier as waste paper is held to be a lawful destruction of such records within the meaning of the rules and regulations of the Commission touching the destruction of records, provided all other requirements under those rules and regulations have been complied with.

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*April 1, 1912.*

**350. RATES APPLICABLE TO SHIPMENTS STOPPED SHORT OF INTENDED DESTINATION, AND FARES APPLICABLE TO PASSENGERS DISCONTINUING JOURNEYS.**—Under transit tariffs requiring the payment of the full rate to final destination at the time the shipment is delivered at the transit point, it sometimes occurs that a shipment is never forwarded to the destination to which charges have been paid: *Held*, That it is not unlawful or improper in such cases to refund the charges that have been paid in excess of what the lawful charges on the shipment would have been if the transit point had been its final destination. (See *Clinton Sugar Refining Co. v. C. & N. W. Ry. Co.*, 28 I. C. C., 367, and *Pillsbury Flour Mills Co. v. G. N. Ry. Co.*, 39 I. C. C., 357.)

*Held further*, That, subject to the time limit of ticket, the same rule applies where a passenger has purchased a ticket and has abandoned his journey at a point short of the destination shown on his ticket and also to a prepaid shipment of freight that is stopped and delivered at a point short of that to which prepaid. (See ruling 115.)

**351. TELEGRAMS OF SHIPPERS.**—Upon inquiry, under *Conference Ruling 327*, whether carriers may send at their expense over shippers' names telegrams directing the routing of certain traffic: *Held*, That carriers may not pay for such telegrams. (See rulings 302, 327, 363, and 480.)

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*April 2, 1912.*

**352. FREE TRANSPORTATION.**—A carrier that has acquired a railroad by foreclosure, reorganization, or otherwise,

may lawfully continue to issue free transportation to the widows, during widowhood, and minor children, during their minority, of persons who died while in the service of the company formerly operating the road.

**353. SHIPMENTS. BY WATER** —In the application of the act, a shipment by water from one port to another in the territory of the United States is to be regarded as coastwise business; a shipment by water from a port of the United States to a port of any foreign country, even though adjacent, is export business. (See rulings 359, 369, and 468.)

**354. THROUGH SHIPMENTS VIA WATER AND RAIL.** —Upon inquiry, and referring to water carriers as defined in section 1 of the act: *Held*, That if a rail carrier and a water carrier separately publish and file their rates applicable to through shipments, traffic over such route may lawfully be transported under through bills of lading, even though the rates are not joint through rates.

*Held further*, That a water carrier may not lawfully accept shipments for transportation on through bills of lading issued by a rail carrier unless the water carrier has lawfully published and filed rates applicable thereto.

*Held further*, That the acceptance by a water carrier of through traffic on through bills of lading issued by a rail carrier is an evidence of an arrangement for continuous carriage which subjects the traffic to the provisions and jurisdiction of our act. (See rulings 66, 155, 201, 401, and 422.)

These holdings shall not be construed so as to conflict with Rule 71, Tariff Circular 18-A, which covers export and import traffic. (Last paragraph as amended in conference November 11, 1912.)

*Held further* (as amended Mar. 6, 1917), That it is not lawful for a carrier subject to this act to issue through bills of lading under an arrangement with a water or other carrier for a continuous carriage until such water or other carrier shall have lawfully filed with this Commission rates applicable to such carriage.

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*April 8, 1912.*

**355. FREE TRANSPORTATION OF OFFICERS OF NONOPERATING COMPANY.**—A railroad constructed

by municipal trustees was afterwards leased under a contract antedating the act to regulate commerce and providing that the lessee company would issue annual passes to the trustees and their agents and would furnish a car for their use in inspecting the line.

Upon inquiry whether these covenants, being a part of the consideration for the lease, may now be complied with by the lessee company, it is *Held*, That officers directors, and other persons connected with a nonoperating company are not entitled to use free transportation. (See rulings 95 and 263.)

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*May 6, 1912.*

**356. DISCLOSING NAME OF CONSIGNEE.**—Upon inquiry: *Held*, That it is unlawful for a carrier to disclose to a shipper the name of the ultimate consignee of a shipment reconsigned in transit by the original consignee. (Sec. 15, act to regulate commerce as amended June 18, 1910. See *In the Matter of Freight Bills*, 29 I. C. C., 498.)

**357. DEMURRAGE, SWITCHING, RECONSIGNMENT, AND DIVERSION CHARGES ON A CARLOAD SHIPMENT TRANSFERRED INTO TWO CARS.**—In case a shipment leaves a point of origin in a single car and for the convenience of the carriers is transferred in transit into two cars which are subsequently detained at destination beyond the free time, demurrage should be assessed as for one car only, so long as either car is detained; and in such cases switching, reconsignment, and diversion charges should be assessed as for one car only. (Amending ruling 250; also also rulings 273, 274, 331, and 339. Also *Scudder v. T. & P. Ry. Co.*, 21 I. C. C., 60.)

**358. DEMURRAGE AT PORTS RESULTING FROM VESSEL DELAY.**—Coal consigned to tidewater was held in the cars at the port awaiting the arrival of a vessel which had been delayed by storms: *Held*, That the delay being due to conditions beyond the control of the rail carrier its demurrage charges might not lawfully be waived. (See rulings 8 and 135.)

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*May 13, 1912.*

**359. SHIPMENTS TO COLON, PANAMA.**—Colon, although within the geographical limits of the Canal Zone, is governed by

and is under the sovereignty of the Republic of Panama. The Commission holds, therefore, that shipments from the United States to that point are entitled to export rates. (See ruling 468.)

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*May 17, 1912.*

**360. ALLOWANCES UNDER SECTION 15.**—*Held*, That an allowance purporting to be made under section 15 must be regarded as a concession from the rate unless duly published by the carrier in its tariffs and thus made available to all shippers furnishing a like facility or performing a like service of transportation in connection with their traffic. (See rulings 19, 78, 132, 267, and 292.)

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*June 3, 1912.*

**361. FREE TRANSPORTATION TO JOINT EMPLOYEE.**—It is desired to move to another station a messenger carried on the pay rolls of an express company who also acts as baggage-man for a rail line, 45 per cent of the salary paid him by the former being refunded to it by the latter: *Held*, That the railroad company may not lawfully transport his household goods free or at rates other than those duly established. (See ruling 208*b*, also ruling 157.)

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*June 4, 1912.*

**362. ASSIGNMENT OF CLAIM.**—In awarding reparation the Commission will recognize an assignment by a consignor to a consignee or by a consignee to a consignor, but will not recognize an assignment to a stranger to the transportation records. (Amending ruling 246. See *Robinson Co. v. American Express Co.*, 38 I. C. C., 735; also *Oden & Elliott v. S. A. L. Ry.*, 37 I. C. C., 345.)

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*June 8, 1912.*

**363. PAYMENT BY CARRIER OF TOLLS ON TELEGRAMS.**—A carrier's tariffs provide that it will pay for telegrams by consignees to shippers when they contain nothing in addition to the necessary specific instructions to route shipments

over its rails: *Held*, That such a rule, when lawfully incorporated in the tariffs of a carrier, is not objectionable. See rulings 302, 327, 351, and 480.)

**364. EXCHANGE OF SERVICES BY TELEGRAPH AND RAILROAD COMPANIES.**—See rulings 305 and 491.

**365. CARRIERS ACTING AS FORWARDERS OF SHIPMENTS.**—*Conference Rulings 98 and 337* do not apply when the consignment is to or in care of the carrier itself for the purpose of being forwarded by that carrier from the point of receipt, at the regular rate, over its own line and connections according to routing instructions, and when no lawful through rate is defeated and no discrimination or other violation of the act results. In no case may the same person act as the agent of the carrier and the shipper. (See *In re Wharfage Facilities at Pensacola, Fla.*, 27 I. C. C., 258; and *Doran & Co. v. N., C. & St. L. Ry.*, 33 I. C. C., 527.)

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*June 10, 1912.*

**366. DEMURRAGE OR STORAGE CHARGES RESULTING FROM FAILURE TO GIVE NOTICE AT NAMED ADDRESS.**—Upon informal complaint it is *Held*, That when the definite address of a consignee is noted upon the bill of lading it is the duty of the initial and of each succeeding carrier to transmit that address to connections participating in the movement, and the duty of the delivering carrier to send notice of arrival to that address; the carrier at fault in this respect will be held liable for demurrage or storage charges accruing as the result of the failure of the notice to reach the consignee. (See ruling 127, also see Code of National Car Demurrage Rules.)

**367. LIQUOR SHIPMENTS NOT DELIVERED.**—An express company may not refund the prepaid charges on shipments of liquor which it carried to destination but could not deliver under a local law.

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*October 7, 1912.*

**368. CARRIER LOCATED WHOLLY WITHIN A STATE.**—Some of the express matter carried by a traction company for

an express company between points within a state originates at or is destined to points outside the state. Upon inquiry, *Held*, That the traction line is subject to the act to regulate commerce and must file reports and otherwise comply with its requirements. (See rulings 197 and 418.)

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October 8, 1912.

**369. COASTWISE TRAFFIC OVER PANAMA RAILROAD.**—Shipments moving between ports of the United States by vessel and the Panama Railroad and to ultimate destination by rail are interstate and must take interstate rates for the rail haul from the port to destination. (See rulings 353, 359, and 468.)

**370. MISROUTING INVOLVING LOSS OF TRANSIT PRIVILEGE.**—Besides stating the route and giving instructions to stop the car in transit to finish loading a shipper also noted a through rate on the bill of lading. This rate did not apply over the indicated route, but was applicable over a route that did not permit the stop specified. *Held*, that the initial carrier, not having advised the shipper of the facts, is liable under *Conference Ruling 286f* for the higher charges that resulted from following the routing instructions. (See ruling 474 amending 286f; also *Jefferson Lumber Co. v. M. & O. R. R. Co.*, 40 I. C. C., 44.)

**371. FREE TRANSPORTATION OF EMPLOYEES OF BUREAUS OF CARRIERS.**—The following persons may lawfully use free transportation:

(a) Employees of a weighing and inspection bureau who perform and supervise the weighing of cars for the carriers maintaining such bureau are exclusively engaged upon the work of such carrier, and are subject to the direction of their officials, but report to and are paid by the weighing and inspection bureau.

(b) Employees of the American Association of Railroad Superintendents known as chief interchange inspectors, whose duties are to settle disputes among car inspectors at junction points where traffic is interchanged with other lines. (See ruling 448.)

**372. FREIGHT MOVED FOR AN EXPRESS COMPANY.**—On a shipment consigned to itself under a joint freight rate an express company is not entitled to the benefit of a rail carrier's division to its junction with the line over which the express company operates. (See ruling 209; also *In re Contracts for Free Transportation*, 16 I. C. C., 246.)

**373. REPAIR OF CARS ON FOREIGN LINES.**—A carrier on whose line a car was damaged made an order on a connecting line, which owned the car, for certain castings to be delivered to it at the junction of the two lines. *Held*, That the former line was a shipper over the line of the owning carrier and must pay the published rate. (See rulings 225 and 333.)

**374. CAR FERRY COMPANY SUBJECT TO THE ACT.**—An incorporated company operates a car ferry connecting the two interstate rail lines by which it is owned. It separately conducts its own affairs and keeps its own accounts, but has no direct dealings with the public. *Held*, That the ferry company is a common carrier subject to the act, and must file tariffs, keep its accounts, and make reports in accordance with the rules and regulations of the Commission.

**375. DESTRUCTION OF RECORDS OF LESSOR COMPANY.**—A corporation owning a railroad that it has leased to a carrier for use in interstate traffic is itself subject to the act and must designate an officer to have charge of the destruction of its records.

**376. REPARATION CLAIMS ON THE INFORMAL DOCKET.**—(Restated in ruling 425.)

*November 14, 1912.*

**377. USE OF COMMISSIONS BY POST-OFFICE INSPECTORS WHEN OFF DUTY.**—The use of his commission for transportation by a post-office inspector when returning to duty from a pleasure trip is unlawful. (See ruling 95f.)

**378. EXPORT BILL OF LADING.**—The rules and regulations of carriers governing bills of lading on export traffic must be published and filed with the Commission.

**379. INTEREST UPON OVERCHARGE CLAIMS.**—(Restated in ruling 489.)

*October 15, 1912.*

**380. REFUND ON UNUSED PORTION OF PASSENGER TICKET.**—A passenger, having a round-trip ticket for an interstate journey with stop-over privileges, stopped off at an intermediate point on the going trip and later proceeded to destination. He did not use the return portion of the ticket. The tariff provided for redemption in such cases at the difference between the fare paid and the published rate to the point where the trip was discontinued. There were in effect between the starting point and destination a one-way fare with stop-over privileges, a one-way fare for a continuous passage, and one-way fares for continuous passage to the stop-over point and from that point to destination. The latter combination was lower than the through fare with stop-over.

*Held,* That the refund was properly made on the basis of the difference between the fare paid and the one-way fare with stop-over privileges.

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*November 11, 1912.*

**381. BRIDGE COMPANIES.**—A bridge company which does not own or operate any motive power or cars and rents its bridge to an interstate carrier need not file tariffs with the Commission. (See ruling 399.)

**382. MILEAGE IN PART PAYMENT FOR TICKET.**—A mileage book presented in part payment for a passenger ticket must be accepted for transportation to the farthest station covered by the remaining coupons, the passenger to pay the local fare from that point to destination. (See ruling 81.)

**383. MISROUTING SHIPMENT.**—The address of the consignee having been omitted, a shipment arriving at destination by a line other than that designated in the routing instructions was sent to a storage warehouse. The consignee had made inquiry for it of the delivering carrier noted on the bill of lading. The freight rates were the same by either route. *Held,* That the initial carrier is liable for the storage and drayage charges resulting from misrouting the shipment.

**384. CHARGES FOR MEALS ON DINING CAR.**—The Commission has no jurisdiction over charges made for meals on dining car. (See ruling 28.)

**385. HIGHER PASSENGER FARE TO INTERMEDIATE POINT THAN TO MORE DISTANT POINT.**—A higher passenger fare was charged to an intermediate point than was in effect to a more distant point over the same route. *Held*, That, the discrimination in its tariff being corrected, the Commission will entertain an application by the carrier to be permitted to make refund on the basis of the lower fare to the more distant point.

**386. FREE TRANSPORTATION TO TIE INSPECTOR.**—A carrier purchases all its crossties from one source and the contract provides for free transportation to the inspectors of the contractor while traveling to inspect and purchase the ties. *Held*, That free transportation may not lawfully be extended to such inspectors. (See rulings 208-c and 430.)

**387. UNIFORM BILL OF LADING.**—The uniform bill of lading contains the following clause:

The value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid), at the place and time of shipment under this bill of lading.

At the time a particular shipment, lost in transit, was made, the market price of a commodity had advanced beyond the price fixed in a contract previously entered into, under which a large quantity had been purchased for future delivery. A construction of the clause being requested, it is the view of the Commission that the provision in the bill of lading contained in the parentheses above quoted does not apply to a shipment made several weeks later than the contract of sale.

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*December 2, 1912.*

**388. TRANSPORTATION OF EXPLOSIVES.**—The regulations of the Commission touching the transportation by freight and express of explosives and other dangerous articles, together with the specifications for the containers thereof, are amended by extending their application to company materials and supplies of that nature. (See ruling 106.)

**389. TARIFFS CONTAINING EXPORT OR IMPORT RATES.**—(Restated in ruling 468.)

**390. AGENT'S ERROR IN FIXING TIME LIMIT TO PASSENGER TICKET.**—Under a tariff providing for an extension of the time limit, when the privilege of stop-over on a through ticket is availed of, the carrier's agent at the stop-over point attached the necessary certificate but erroneously showed an expiration date not sufficiently in advance to permit the holder to reach destination by a continuous trip on a regular train; and in consequence it was necessary for the holder to pay the local fare of a connecting line to destination from the point where the time limit expired.

*Held*, That the carrier whose agent made the error must bear the entire burden of the refund of the additional fare. (See rulings 167 and 277.)

**391. FARE PAID UNDER MISAPPREHENSION OF A PRIVILEGE OFFERED UNDER A THROUGH TICKET.**—A passenger, not knowing that a coupon attached to his through ticket, and good for passage between two intermediate points by steamship, might be exchanged for transportation by rail between those points, failed to make the request required under the tariff and purchased a local railroad ticket therefor.

*Held*, That that carrier may not lawfully refund the amount of the local fare.

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*December 9, 1912.*

**392. MISROUTING INVOLVING WRONG TERMINAL DELIVERY.**—Rescinded by ruling 509.

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*December 10, 1912.*

**393. REFUND OF PASSENGER FARE.**—The holder of a round-trip ticket died at destination, all required steps for extending the time limit for the return trip having been previously taken except the affixing of the holder's signature. Had the signature been affixed the ticket would have sufficed for the transportation for the corpse. Upon inquiry, *Held*, That refund may be made by the carrier.

**394. JURISDICTION OVER WIRELESS MESSAGES.—**

The Commission considers that it has jurisdiction over wireless messages from a commercial station in the United States to a ship at sea, whether it be a United States or foreign ship. It does not consider that it has jurisdiction over messages between two American ships at sea. (See ruling 410.)

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*December 16, 1912.*

**395. VIOLATIONS OF THE FOURTH SECTION.—**Confirming the general principle of an order entered and announced on January 26, 1911, it is *Held*, That when a carrier in obedience to the requirement of the fourth section of the act has, after August 17, 1910, corrected discriminations against intermediate points, it may not lawfully restore such discriminatory rates unless upon formal application the Commission finds justifying circumstances and authorizes a deviation from the long-and-short-haul rule. (See ruling 406; also *Cement Rates From Mason City, Ia.*, 30 I. C. C., 429.)

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*February 10, 1913.*

**396. SPECIAL REPARATION ON INFORMAL COMPLAINT. SUPERSEDING RULING 220-c.—**Reparation under informal proceedings will be authorized in instances where the tariff rate has been applied, upon the filing of an application by the carrier or carriers which participated in the transportation of the property in question, containing an admission that the rate charged was unreasonable, supported by a statement of the facts substantially showing that the charges demanded for the transportation service performed was excessive, that within a reasonable time a tariff naming the rate upon basis of which adjustment is sought has been published, and that such rate has been made lawfully applicable via the route over which the shipment moved. The Commission's order for refund on account of a reduced rate or changed tariff regulation will require the maintenance of such rate or regulation for at least one year. (Superseding ruling 38; also see rulings 14, 130, and 200-a; also *Riverside Mills v. Georgia R. R.*, 20 I. C. C., 424; and *Jefferson Lumber Co. v. M. & O. R. R. Co.*, 40 I. C. C., 44.)

*January 6, 1913.*

**397. REPARATION FOR MISROUTING.**—Until the Commission otherwise directs, carriers may adjust claims arising under item (f) of *Conference Ruling 286* without first bringing them to the attention of the Commission; in pursuing this course, however, they must accept full responsibility for the correct application of the rule. (See ruling 474, amending ruling 286f.)

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*January 13, 1913.*

**398. FREE TRANSPORTATION OF COLLEGE SUPPLIES.**—A college maintained largely by voluntary contributions provides free tuition through scholarships for worthy and needy pupils, but collects tuition from all students who are able to pay it: *Held*, That under section 22 of the act coal contributed to the institution may not be transported by carriers at other than the published rates. (See ruling 477.)

**399. REPORTS BY BRIDGE COMPANIES.**—A bridge company which has leased its bridge to an interstate rail line must file the annual, monthly, and other reports required of lessor companies under the accounting rules of the Commission. (See ruling 381.)

**400. PASSES FOR TRAIN AUDITORS EMPLOYED BY AN AUDIT COMPANY.**—An audit company under contract with several carriers provides train auditors to collect tickets; they do no other work and may be transferred from road to road as the parties to the contract may require. Upon inquiry, *Held*, That a trip pass may be issued by any such carrier for a particular journey over its line by an auditor in connection with its own business, but that annual passes must not be granted.

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*January 14, 1913.*

**401. COASTWISE TRAFFIC MOVING ON A THROUGH BILL OF LADING TO INLAND POINT.**—A through bill of lading was issued on a shipment routed over a rail-and-water route from an inland point in one state to an inland point in another state. Under instructions from the consignee the ship-

ment was delivered by the coastwise line to a forwarding company at the port of arrival, to be delivered by it to a rail line for carriage to the inland destination as a local state movement. The delivering rail line advanced the charges of the initial and coastwise lines and those of the forwarding company and collected them, together with its own charges, at destination. The sum of the local rates thus applied exceeded the through published rate from point of origin to destination. *Held*, That the through rate should have been assessed on the shipment. (See rulings 66, 155, 201, 354, and 422.)

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*February 3, 1913.*

**402. CONCURRENCE BY A LESSOR COMPANY IN RATES PUBLISHED BY A LESSEE.**—When the lessor company participates in the service with its engines and crews and is compensated therefor on a percentage division it should concur in and be shown as a party to the tariffs of the lessee naming passenger fares and freight rates over the lessor's rails. (See ruling 341.)

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*February 4, 1913.*

**403. STORAGE CHARGES ACCRUING DURING RECONSTRUCTION OF A LEASED WAREHOUSE.**—A terminal company may not cancel charges that accrued, under published rates, on shipments landed and stored on its wharf with its consent pending the repair of a warehouse which it had leased to the shipper and which had been destroyed during a storm.

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*March 10, 1913.*

**404. STORAGE CHARGES ACCRUING BECAUSE OF WEATHER CONDITIONS.**—Because of inclement weather and impassable roads shippers failed to remove less-than-carload piled in the tariff. (See rulings 242 and 313.) See code of National Car Demurrage Rules.

freight within the free time specified in the tariffs and storage charges resulted. Upon inquiry: *Held*, That the same rule may be applied to storage charges as to demurrage charges if so pro-

**405. DEMURRAGE RULES APPLICABLE TO SHIPMENTS.**—Before certain shipments were removed by the consignee at destination amended demurrage rules became effective providing charges after certain free time had elapsed: *Held*, That the rules in effect at the time the shipments arrived at the demurrage point must control. (See rulings 473 and 518.)

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*April 7, 1913.*

**406. VIOLATION OF THE FOURTH SECTION.**—A violation of the long-and-short-haul clause, having been canceled out of its tariffs, may not lawfully be restored by the carrier without the special authority of the Commission, even though the violation was in existence when section 4 of the act was amended on June 18, 1910. (See ruling 395.)

**407. COMMISSIONS PAID BY TELEGRAPH COMPANIES.**—It is unlawful for a telegraph company to pay to the person, firm, or company in whose building a telegraph office is located any commission on the messages received by or transmitted for that establishment.

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*April 8, 1913.*

**408. NOTICES OF ORAL ARGUMENT.** (See current Rules of Practice.)

**409. APPLICATION OF AVERAGE AGREEMENT UNDER UNIFORM DEMURRAGE RULES.**—No average agreement made under the uniform demurrage rules may properly combine in one account the cars of more than one consignee; each average agreement must cover the business of one consignee only. Demurrage agreements may not lawfully be made with draymen or with public elevators serving various consignees.

This rule is not intended to prohibit the application of the average agreement at a public elevator or warehouse so far as it applies to cars consigned to the elevator or warehouse company. (See ruling 463; also see Code of National Car Demurrage Rules.)

**410. EXCHANGE OF PASSES WITH WIRELESS TELEGRAPH COMPANIES.**—It is the view of the Commission that

Upon inquiry: *Held*, That if a company engages in interstate commerce at all it thereby becomes subject to the act and is amenable to its provisions with respect to making statistical, annual, and other reports to the Commission and must file tariffs (See rulings 197 and 368.)

**419. REPARATION ON THE BASIS OF STATE RATES.**

—Upon further consideration *Conference Ruling 251* is modified as follows:

The Commission will not recognize as a basis for reparation any rate that is not on file with it, except that in misrouting cases a lower state rate not on file here may be accepted as the basis for reparation when officially verified by local authorities. (See ruling 93; also *Lathrop Lumber Co. v. A. G. S. R. R.*, 27 I. C. C. 250, and *McCaull-Dinsmore Co. v. G. N. Ry.*, 41 I. C. C., 178.)

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*June 3, 1913.*

**420. JURISDICTION OVER TELEPHONE COMPANIES IN PORTO RICO.**—It is the view of the Commission that it has no jurisdiction over the service and rates of telephone companies the lines of which are wholly within Porto Rico.

**421. A CARRIER MAY NOT LEASE ITS ELEVATORS AT A NOMINAL RENTAL.**—An interstate carrier desires to lease to a grain dealer at a nominal rental an elevator which has not been in use for some time, and which the carrier is anxious to dispose of because the operation of the elevator would attract business to the road. Upon inquiry: *Held*, That such a transaction would be illegal (See rulings 94 and 325.)

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*June 5, 1913.*

**422. JURISDICTION OVER TRAFFIC MOVING ON THROUGH BILL OF LADING TO HAWAII.**—A steamship company filed a proportional tariff with the Commission providing export commodity rates from a port in the United States to a port in the territory of Hawaii. The traffic was covered by through bills of lading from inland points in the United States to the port of transshipment and moved under

tariffs filed with the Commission. Upon inquiry: *Held*, That under the Panama Canal act the Commission has jurisdiction over shipments moving under the steamship company's proportional tariff. (See rulings 66, 155, 201, 354, and 401.)

**423. COMBINATION RATE MAY NOT BE APPLIED UNTIL JOINT THROUGH RATE IS CANCELED.**—A mixed carload shipment moved under a joint mixed carload rate. There was also in effect at the time of the shipment a combination carload rate on the heavier weighted commodity in the mixture and a through less-than-carload rate on the lighter weighted commodity, which made a lower charge than that based on the joint mixed carload rate. The joint mixed carload rate had not been canceled. Upon inquiry: *Held*, That a refund to the basis of the lower combination could not lawfully be made.

**424. ABSORPTION OF SWITCHING CHARGES OF AN INDUSTRY.**—An industry operates its own rails as a plant facility to a connection with the plant rails of another industrial concern, the latter rails, on the other side of the plant, connecting with the rails of an interstate carrier. The trunk line desires to extend its service to the rails of the first industry. The intermediate industry refuses trackage rights to the carrier but will continue itself to switch cars to it, and will accept compensation therefor from the carrier instead of from the other industry, provided this course does not subject it to the act as a common carrier.

It is the view of the Commission that the service performed by the intermediate industry is a service for the shipper and not for the carrier and that the carrier may not lawfully absorb the switching charge of the intermediate industry.

**425. REPARATION CLAIMS ON THE INFORMAL DOCKET.**—Upon further consideration *Conference Ruling 376* is amended to read as follows:

In special docket cases no order as to the rate for the future shall be entered where the joint rate in effect at the time of shipment exceeded the aggregate of the intermediate rates and the rates have been subsequently changed in such a manner as that at the time the order of the Commission is entered the

through rate does not exceed the sum of the intermediate rates, or in cases where at the time the shipment moved the rate for a short haul was greater than the rate for a longer haul over the same line or route, in the same direction, the shorter being included within the longer distance and the rates have been subsequently changed in such a manner that at the time the distance does not exceed the rate for the longer distance. (Modifying ruling 200a.)

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June 9, 1913.

**426. TIME PASSES TO LOCAL ATTORNEYS, SURGEONS, ETC.**—The Commission adheres to the ruling many times repeated that it is unlawful for an interstate carrier to issue time passes to local attorneys, surgeons, and others, who do not devote substantially all their time to the work or business of the carrier. The principle of *Conference Ruling 208-a* is reaffirmed. (See ruling 449.)

**427. INDUSTRIAL SWITCHING TRACKS.**—Restated in ruling 512.

**428. PAYMENT BY RAIL CARRIERS OF ADVANCE CHARGES ON IMPORT TRAFFIC.**—A rail carrier may not advance charges to an ocean carrier on import traffic except under a proper provision therefor in its tariffs. When such advance charges are made the freight bill of the rail line must show in separate items the charges so advanced and the charges of the inland carrier or carriers; it must also show the tariff rate or rates of the inland carrier or carriers. The name of the ocean carrier to which the charges are advanced must also be shown.

In order that carriers may have time in which to adjust their tariffs in conformity herewith this ruling will become effective on August 15, 1913. (See rulings 62 and 444; also *Express Rates, Practices, Accounts, and Revenues*, U. R. Op. A-980.)

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June 16, 1913.

**429. FREE OR REDUCED RATE TRANSPORTATION TO FAMILIES AND HOUSEHOLD GOODS OF POSTAL CLERKS.**—The law does not authorize free or reduced rate

transportation for the families and household goods of postal clerks whose headquarters were changed for the convenience of a carrier.

**430. TIE INSPECTORS NOT ENTITLED TO FREE TRANSPORTATION.**—A man who has a contract to furnish ties to an interstate carrier may not lawfully have free transportation as a tie inspector. (See ruling 386.)

**431. REDUCED RATE TRANSPORTATION FOR CONVICTS UNLAWFUL.**—It is the view of the Commission that reduced interstate fares may not be granted by carriers for transporting to the penitentiary persons convicted in the United States courts for violation of Federal laws.

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*June 18, 1914.*

**432. WAIVER OF UNDERCHARGES.**—(Canceled by ruling 472.)

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*June 23, 1913.*

**433. SHIPPER LIABLE FOR HIS ERROR IN MAKING L. C. L. SHIPMENTS.**—Besides being expressly so provided in the rules of all freight classifications, it is on broad general grounds the duty of a shipper correctly to mark packages of less-than-carload freight intended for transportation, and when so marked the carrier is held to a strict responsibility for their safe delivery at destination.

A package of merchandise was addressed by a shipper to Lake City, Fla., instead of Lake City S. C. *Held*, That the shipper making the error must bear the burden of the resulting freight charges, and the fact that the correct address was noted on the bill of lading is not material. *Parlin & Orendorff Plow Co. v. United States Express Co.*, 26 I. C. C., 561, reaffirmed. (See rulings 237 and 248; also *American Agricultural Chemical Co. v. B. & O. R. R. Co.*, 28 I. C. C., 401.)

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*July 23, 1913.*

**434. PASSES TO OFFICIALS OF RAILROADS IN ADJACENT FOREIGN COUNTRIES.**—Free interstate transpor-

tation may lawfully be issued to officials of any railroad in an adjacent foreign country which has filed with this Commission joint tariffs and concurrences in connection with interstate carriers in the United States without reservation as to the Commission's jurisdiction. (See ruling 475.)

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*July 24, 1913.*

**435. DESTRUCTION OF RECORDS.**—It is the view of the Commission that all maps, profiles, plans, specifications, estimates of work, records of engineering studies, field books, and other records pertaining to the physical property of carriers come within the prohibition of destruction contained in section 20 of the act, and as such shall not be destroyed or otherwise disposed of unless their destruction be specifically authorized in the orders of the Commission in the matter of the destruction of records. (See orders of the Commission governing the destruction of records.)

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*July 25, 1913.*

**436. PASSES TO DIRECTORS OF A CARRIER IN THE HANDS OF RECEIVER.**—When the management of a railroad company has been placed in the hands of receivers and the officers and directors of the railroad company are not employed by the receivers: *Held*, That such officers and directors are not entitled to free transportation. (See ruling 165.)

**437. EMBARGOES ON ACCOUNT OF REVOLUTION IN ADJACENT FOREIGN COUNTRIES.**—Embargoes against the receipt of freight have been established by Mexican railroads at different times on account of revolutionary troubles in Mexico. Upon inquiry: *Held*, That interstate carriers in the United States under the special circumstances will be permitted to file with the Commission the proper application for authority to establish on short notice tariffs naming the conditions and rates under which they will return or otherwise dispose of property billed to points in Mexico, but which they have been unable to deliver because of the revolutionary conditions in that country. It is understood that the tariffs will arrange that those carriers which participated in the haul

within the United States will prorate the expenses of *per diem*, storage, loading, and unloading of the shipments or of their return to the points of origin.

- 438. REFUND OF PASSENGER FARES.—A ticket was purchased for an interstate journey during a time of high water, the agent stating that through trains were being operated without difficulty or delay. Upon arrival of the train at an intermediate point the conductor informed the passenger that the train would be abandoned on account of high water. The passenger then purchased a ticket back to the point of origin. Upon inquiry: *Held*, That a refund of all the fares paid on the trip may be made, provided the railroad company publishes a general tariff rule providing a refund of fares to all passengers affected by such circumstances and conditions.

439. COMPANY MATERIAL HAULED OVER ANOTHER LINE UNDER TRACKAGE RIGHTS.—A carrier having trackage rights permitting it to haul general traffic may haul its own company material over the leased track as over its own rails. In the case passed upon in *Conference Ruling 153* there was no arrangement for handling commercial freight over the leased track.

440. DESTRUCTION OF RECORDS.—An express company has retired from business and asks permission to destroy certain of its records: *Held*, That in the absence of special permission by the Commission the records must not be destroyed except under the rules of the Commission.

441. TARIFFS COVERING ABSORPTION OF DRAYAGE CHARGES.—The absorption of drayage charges being under consideration, the Commission holds:

(a) Where there is an additional transfer or drayage charge in connection with a through shipment, the carrier's tariffs must specify what that charge shall be.

(b) If such drayage or transfer charge is absorbed, in whole or in part, by a carrier, the tariffs must show the amount of such transfer charge that will be absorbed.

(c) A drayage firm is not a proper party to a joint tariff nor is it a carrier under the provisions of our act; therefore, no tariffs can properly be filed by it.

(d) There is no provision in the law which requires, and the Commission has no authority to require, a carrier to confine such drayage to one draymen or one firm of draymen.

(e) The responsibility in case of loss and damage while a shipment is in charge of truckman to whom it has been committed by the carrier is a question for the carrier to resolve, and is not for our determination.

**442. FEEDING AND GRAZING IN TRANSIT.**—*Conference Ruling 17* is amended to read as follows:

In connection with the published privilege of feeding and grazing in transit, or where carriers are required to feed live stock in transit, under the provision of an act approved June 29, 1906, commonly called the 28-hour law, carriers may lawfully provide in their tariffs that they will furnish feed at current market prices and bill the cost thereof, together with an addition not exceeding 10 per cent of such cost to cover the value of their services, as advance charges.

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*October 7, 1913.*

**443. THROUGH RATE ONLY LAWFUL RATE FOR THROUGH SHIPMENTS.**—Upon inquiry as to whether a through distance tariff rate should be applied in cases where a combination rate made up of a rate to an intermediate point and a distance tariff rate beyond makes a lower though charge: *Held*, That the through rate is the only lawful rate. (See ruling 220g.)

**444. ADVANCES OF CUSTOMHOUSE BROKERAGE FEES.**—Rail carriers may properly advance customhouse brokerage fees and import duties and charges only when proper provision therefor is made in their published tariffs. (See rulings 7, 221, and 300.)

**445. CHECKING SAMPLE BAGGAGE.**—When carriers' tariffs provide for checking sample baggage and define sample baggage as that which is carried for display and not for distribution or sale, it is not lawful to distribute or sell articles contained in such baggage at any point to which it has been so checked. Such articles may lawfully be distributed or sold at any point to which they are shipped by mail, freight, or ex-

press, and they may lawfully be so shipped from a point to which they have been checked as baggage for use as samples or for display. (See ruling 455; see also *Jewelers' Protective Union v. P. R. R.*, 36 I. C. C., 73.)

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*November 4, 1913.*

**446. PASSES TO STATION AGENT WHO DEVOTES ONLY PART TIME TO RAILROAD DUTIES.**—Upon inquiry: *Held*, That a station agent employed by a railroad company may not lawfully receive free transportation when he employs other persons to perform his duties so that he may devote the greater part of his time to other business. (See ruling 208a.)

**447. APPLICATION OF FOURTH SECTION.**—The provisions of the fourth section apply where the point of origin is in an adjacent foreign country and the intermediate point and more distant point of destination are in the United States, or where the point of origin and the intermediate point are in the United States and the more distant point of destination is in an adjacent country. (See ruling 318.)

**448. FREE TRANSPORTATION TO MEMBERS OF FAMILIES OF EMPLOYEES OF BUREAUS OF CARRIERS.**—Upon inquiry it was agreed that *Conference Ruling 371*, holding that employees of bureaus maintained by common carriers may lawfully use free transportation, must necessarily be understood as meaning that members of their families may also lawfully use free passes.

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*December 1, 1913.*

**449. FREE TRANSPORTATION OF VETERINARY SURGEONS.**—A veterinary surgeon not carried regularly on the pay rolls of a carrier but engaged by the carrier to examine live stock offered for shipment or to care for injured stock may not be furnished with a term pass but may lawfully use a trip pass over the lines of a carrier when performing a bona fide service for it. (See rulings 208a, 208b, and 426.)

*December 4, 1913.*

**450. TARIFFS OF A RAILROAD SYSTEM—THE TRADE NAME.**—The tariffs and concurrences of a railroad system must show, in addition to its trade name, the corporate title or titles of the various lines of which the system is composed.

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*January 6, 1914.*

**451. DEMURRAGE CHARGES ON DAMAGED SHIPMENTS.**—The uncertainty of a consignee as to whether or not he will accept a damaged shipment does not justify the carrier in waiving the demurrage charges accruing on the shipment pending his decision.

**452. FREE TRANSPORTATION OF PROPERTY FOR TOWNSHIPS AND COUNTIES.**—Upon inquiry: *Held*, That townships and counties are municipalities within the meaning of section 22 of the act to regulate commerce and carriers may lawfully transport their property free or at reduced rates. (See rulings 33, 36, 297, and 311.)

**453. CHANGE OF ROUTE BY CONSIGNEE.**—Rescinded by ruling 502.

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*January 12, 1914.*

**454. FREE TRANSPORTATION FOR CUSTOMS BROKER.**—A customs broker employed by a carrier on a commission basis and not paid a regular salary and who does not devote substantially all his time to the service of the company is not entitled to use free transportation. (See ruling 208a.)

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*February 3, 1914.*

**455. SALE OF PROPERTY TRANSPORTED AS BAGGAGE.**—Upon inquiry as to whether or not it is unlawful for a person to sell property transported as baggage and upon which excess baggage charges on the entire weight are paid: *Held*, That if the carrier's tariffs make provision for the transportation of such property at excess baggage rates on the entire weight it would not be in violation of the law to dispose of the property

by sale or otherwise. (See ruling 445; also *Jewelers' Protective Union v. P. R. R.*, 36 I. C. C., 73.)

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*March 2, 1914.*

**456. WRITTEN NOTICE TO CARRIER CONSTITUTES PRESENTATION OF CLAIM.**—Restated in ruling 510.

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*March 3, 1914.*

**457. WRITTEN STATEMENTS OF RATES FURNISHED BY CARRIERS.**—It is the understanding of the Commission that under section 6 of the act carriers are required to make written statements as to rates only in relation to shipments about to be made or shipments affected by contracts about to be entered into, and that the provisions of that section do not require carriers to expend their time and labor in making such statements upon demands therefor by individuals wishing to issue books or notices of rates, or for other purely speculative purposes.

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*March 16, 1914.*

**458. LOSS OF RETURN PORTION OF PASSENGER-FARE TICKET BY AGENT OF CARRIER.**—The return portion of a passenger-fare ticket was lost by the agent of a carrier, and the carrier was obliged to furnish the traveler another ticket upon which to complete the return journey. Upon inquiry: *Held*, That the carrier at fault must assume the entire loss and pay to each carrier interested its proportion of the value of ticket furnished in lieu of the return portion of ticket lost. If, however, the return portion of ticket is later found, the carriers receiving settlement for the ticket furnished in lieu thereof may properly return the amounts received in settlement of the additional ticket furnished.

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*April 13, 1914.*

**459. PASSES FOR SUPERINTENDENT OF MAIL SERVICE OF THE CANADIAN GOVERNMENT.**—It is the view of the Commission that free annual transportation may not law-

fully be issued to a superintendent of mail service of the Canadian government.

**460. TELEGRAMS AND CABLEGRAMS.**—The practice by telegraph and cable companies of returning to patrons the original telegrams or cablegrams in support of their bills is unlawful. Such documents must be retained in conformity with the regulations of the Commission governing the destruction of records of telephone, telegraph, and cable companies.

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*April 14, 1914.*

**461. WATER CARRIERS CONTROLLED BY OTHER COMMON CARRIERS.**—Section 5 of the act as amended by the Panama Canal act prohibits common carriers subject to the act to have, after July 1, 1914, any interest, directly or indirectly, in any common carrier by water, or any vessel carrying freight or passengers, with which said carrier does or may compete for traffic.

The manifest purpose of this law is to bring about discontinuance of common ownership or control of water carriers except in those instances in which, after investigation and hearing, it is found that such operation is in the interest of the public or of advantage to the convenience and commerce of the people, and neither excludes, prevents, nor reduces competition on the route by water. The act does not in specific words authorize the continuance of such common ownership or control beyond July 1, 1914, pending the decision of the Commission on application relative thereto; but it is provided that any application filed before July 1, 1914, may be considered and granted thereafter. It is not conceivable that the Congress intended that the service should be withdrawn from the public on July 1, 1914, if for good and sufficient reasons it had been impossible for the Commission to determine the questions presented in the application before that date. Although the language employed is different, it seems that the legislative intent was similar to that expressed in the amended fourth section of the act and in the safety appliance acts.

The Commission therefore interprets the amendment to section 5 of the act as contemplating and authorizing a continuance of any existing common ownership or control after July 1, 1919,

between rail and other carriers and water carriers not traversing the Panama Canal until such time as the Commission has passed upon the application relative thereto, provided such application is filed with the Commission prior to July 1, 1914.

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*April 25, 1914.*

**462. CARRIER MUST INVESTIGATE BEFORE PAYING CLAIMS.**—Upon further consideration *Conference Ruling 15* is modified as follows:

A carrier can not shield itself from responsibility in paying a claim by accepting the authority of a connecting line to pay it, but must ascertain the lawfulness of the claim and allow it or not upon the basis of its own investigation. This is not to be understood, however, as requiring each carrier interested in the claim to make an independent investigation. The principle of direct investigation embodied in the rules of the freight claim association, whereby the carrier against which a claim is presented undertakes to make the investigation for itself and for the other carriers concerned in the joint movement out of which the claim arises, is approved by the Commission as a means of expediting the adjustment of claims. In all cases, however, the investigation so made must be thorough and must disclose a lawful basis for payment before the claim is adjusted. (See ruling 236; also *Charleston & W. C. Ry. Co. v. Varnville Co.*, 237 U. S., 597.)

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*May 19, 1914.*

**463. APPLICATION OF THE AVERAGE AGREEMENT UNDER UNIFORM DEMURRAGE RULES.**—A storage warehouse company which is specifically designated as the consignee of carloads of miscellaneous freight, the property of others, and which company is responsible for the unloading and for the detention of cars so received, may be made the subject of the average demurrage rule. Cars arriving otherwise consigned and afterwards ordered to the warehouse for storage may not be included under the average agreement with the warehouse company. (See ruling 409.)

*May 28, 1914.*

**484. INTEREST UPON OVERCHARGE CLAIMS.**—Restated in ruling 489.

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*July 11, 1914.*

**485. ORDERS ISSUED ABROAD FOR DOMESTIC PASSENGER TICKETS.**—Under an arrangement with the rail carriers trans-Atlantic steamship lines in selling a ticket for ocean passage from a foreign port will also sell an order upon a rail line for transportation from the port of arrival to an inland point, based on the fare in force at the time the order is issued. Upon inquiry as to whether a carrier may honor such an order when the fare has been changed between the date of its issue and the date of its presentation: *Held*, That the order may be honored on the basis of the fare in effect at the time it was sold, provided the rail carrier has published an appropriate tariff provision for the acceptance of such orders at the fares in effect when they were issued.

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*July 17, 1914.*

**486. PASSES FOR OFFICERS AND EMPLOYEES OF TAP LINES.**—Under the decision of the Supreme Court of the United States in *The Tap Line Cases*, 234 U. S., 1, it is the view of the Commission that the law does not prohibit the use of interstate free passes by the officers and employees of common-carrier tap lines who devote substantially all their time to the service of the tap line and where, by the use of such free passes, no unlawful discriminations are effected. (See ruling 208*a* and *The Tap Line Case*, 31 I. C. C., 494.)

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*July 29, 1914.*

**487. EXCURSION TICKET ISSUED ON DATE NOT AUTHORIZED BY TARIFF.**—A station agent sold a colonist ticket at a reduced fare before the commencement of the period designated in the tariff. Upon inquiry: *Held*, That the selling carrier is responsible for the error and in settlement with its connections must allow them their usual divisions of the fare lawfully in effect on the date of sale.

*December 23, 1914.*

**468. EXPORT AND IMPORT RATES—CONFERENCE RULING 389 RESTATED.**—In order to avoid controversies and questions: *Held*, That tariffs hereafter issued containing rates applicable to export or import traffic shall specify, by inclusion or exclusion, the countries to or from which such rates are applicable, whether such countries are or are not adjacent to the United States.

In the interest of clearness the tariffs should also specify whether or not shipments to or from Cuba, the Philippine Islands, Porto Rico, the Hawaiian Islands, or the Canal Zone are included. (See rulings 353, 359, and 369.)

**469. FREE TRANSPORTATION OF SUPPLIES FOR LABORERS.**—Upon inquiry as to whether or not a carrier may transport without charge food or other supplies for the use of laborers employed on its line: *Held*, That such shipments may not be carried free except when shipped by an agent of the carrier acting for it and for whose actions the carrier assumes and accepts responsibility. (Compare ruling 413.)

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*December 24, 1914.*

**470. SPECIAL RATES ON SHIPMENTS IN FOREIGN CARS.**—A carrier may not by tariff limit the application of certain proportional rates to shipments in cars of other carriers.

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*January 19, 1915.*

**471. CHANGES IN RECONSIGNMENT CHARGES.**—At the time a shipment commenced to move from the point of origin the tariff provided four days free time for reconsignment, but before the shipment reached the reconsigning point the time had been lawfully reduced to one day: *Held*, That the tariff in effect when the shipment was made applied.

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*May 3, 1915.*

**472. WAIVER OF UNDERCHARGES.**—On and after August 1, 1915, the Commission will not consider on the informal docket any application for authority to waive collection of undercharges in connection with shipments delivered subsequent

to July 31, 1915. *Conference Rulings 258 and 432* are hereby rescinded as of August 1, 1915.

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*May 24, 1915.*

**473. DEMURRAGE AND STORAGE RULES.**—Upon inquiry and to remove the confusion that exists among carriers and shippers it is *Held*, That demurrage and storage in transit are controlled by the tariff in effect when the initial movement begins; that demurrage on outbound shipments is controlled by the tariff in effect when the car is actually set for loading; that demurrage and track storage at destination are controlled by the tariff in effect when the car is actually or constructively set for unloading; and that offtrack storage by a carrier at destination, in its warehouse or otherwise, is controlled by the tariff in effect at the time such storage begins. (See rulings 405 and 518.)

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*May 25, 1915.*

**474. ADJUSTMENT OF CLAIMS FOR DAMAGES RESULTING FROM MISROUTING.**—*Conference Rulings 286-d and 286-f* are amended to read as follows:

(a) It is the duty of a carrier to make delivery in accordance with routing directions. Where such routing instructions have not been followed and delivery is tendered at another terminal than that designated, it remains the duty of the delivering carrier to make delivery at the terminal designated in routing instructions, either by a switch movement or by carting. In either event the additional expense involved in making such delivery must be borne entirely by the carrier responsible for the misrouting and the reimbursement thereof to the delivering carrier may be made by the carrier at fault without a specific order of the Commission. (See ruling 214*d*.)

(b) Restated in ruling 509.

(c) The obligation lawfully rests upon the carrier's agent to refrain from executing a bill of lading which contains provisions that can not lawfully be complied with or provisions which are contradictory, and therefore impossible of execution. When, therefore, the rate and the route are both given by the shipper in the shipping instructions and the rate given does not apply

via the route designated it is the duty of the carrier's agent to ascertain from the shipper whether the rate or the route given in the shipping instructions shall be followed. The carrier will be held responsible for any damages which may result from the failure of its agent to follow this course.

If, however, the agent of the carrier, after exercising reasonable diligence, is unable to obtain more definite instructions as to routing, the goods should be sent via the rout specified in the bill of lading. (Cancels rulings 159, 186, 192, 214-i, and 231; see rulings 243, 370, and 397. See *Gibson Fruit Co. v. C. & N. W. Ry. Co.*, 21 I. C. C., 645; *Ludowici-Celadon Co. v. M. P. Ry. Co.*, 22 I. C. C., 589; *American Agricultural Chemical Co. v. B. & A. R. R. Co.*, 28 I. C. C., 400; *Goldfield Cases*, 34 I. C. C., 378; *Texarkana Pipe Works v. B., S. L. & Wn. Ry.*, 38 I. C. C., 341; *Chapin & Co. v. C., I. & L. Ry. Co.*, 38 I. C. C., 613; *Jefferson Lumber Co. v. M. & O. R. R. Co.*, 40 I. C. C., 44; *Laclede-Christy Clay Products Co. v. M. P. Ry. Co.*, U. R. Op. A-780; and *B. McCracken & Son v. B. & O. R. R. Co.*, U. R. Op. 2199.)

**475. PASSES TO OFFICERS AND EMPLOYEES OF OCEAN AND FOREIGN COMMON CARRIERS.**—In view of the decisions in *United States v. Erie Railroad*, 236 U. S., 259, so much of *Conference Rulings* 59-a, 95-g, and 196 as pertains to passes to officers and employees of ocean common carriers and of rail common carriers in foreign countries not adjacent is withdrawn. (See ruling 434.)

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*June 2, 1915.*

**476. PASSES TO THE FAMILY OF A DECEASED PENSIONED EMPLOYEE.**—Upon inquiry as to whether or not common carriers may grant free transportation to the members of the family of a deceased pensioned employee: *Held*, That with the exception of widows during widowhood and minor children during minority, the members of the family of a deceased pensioned employee may not lawfully use free passes. (See rulings 103, 173, and 193.)

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*June 14, 1915.*

**477. FREE TRANSPORTATION OF CAR WITH EXHIBITS FOR STATE AGRICULTURAL COLLEGE.**—A state col-

lege uses a car containing live stock and agricultural products in giving free educational lectures and demonstrations to farmers in different parts of the state. Upon inquiry: *Held*, That if the college is sustained by the state and if the arrangements are made with the proper and responsible officers of the state such car and contents and the necessary agents employed in connection therewith may lawfully be moved by carrier without charge or at reduced rates. (See ruling 398.)

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*July 8, 1915.*

**478. PASSES TO WATCH AND TIME INSPECTORS.**—Upon inquiry: *Held*, That free passes may not lawfully be used by watch and time inspectors who, while engaged in the performance of a service for a carrier, pursue other business or sell or solicit the sale of merchandise of any character either to the employees of the carrier or to the general public. (See ruling 208b.)

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*July 22, 1915.*

**479. PASSES TO EMPLOYEES OF PRIVATE CAR LINES.**—A company owns and leases cars to railroad companies on a mileage basis and ices and re-ices such cars at various points on the carriers' lines at the expense of the carrier. Inasmuch as the furnishing of cars and the icing of cars are duties imposed upon carriers under section 1 of the act, and following the principle laid down in *Conference Ruling 208-b*, it is *Held*, That passes may lawfully be issued to the officers and employees of the car company when traveling solely for the purpose of furnishing or icing cars for shipments over the carrier's own lines, but may not lawfully be issued to or used by the officers of the car company when not traveling in the performance of a *bona fide* service for the carrier.

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*July 22, 1915.*

**480. TELEPHONE MESSAGES RELATING TO SHIPMENTS.**—Upon inquiry: *Held*, That *Conference Rulings 302, 327, 351, and 363*, regarding the exchange of messages between carriers and shippers, relate to telephone messages as well as to telegrams.

*July 23, 1915.*

**481. ERROR IN THE ISSUANCE OF PASSENGER TICKETS.**—Restated in ruling 487.

*July 26, 1915.*

**482. ROUTING OF SHIPMENTS BY CONSIGNEES.**—Rescinded by ruling 502.

*October 4, 1915.*

**483. COMMODITY RATE BASED UPON A MAXIMUM CARLOAD WEIGHT.**—Under a tariff naming a commodity rate per car, not exceeding a specified maximum weight, and also a class rate with a minimum carload weight: *Held*, That charges should be assessed upon the basis of the commodity rate, any excess weight to be charged proportionately; but the carrier may refuse to receive in one car a shipment weighing more than the maximum load prescribed for that car. (See ruling 84, and also Rule 7 of Tariff Circular 18-A.)

**484. PASSES TO EMPLOYEES OF PRIVATE CAR LINES.**—*Conference Ruling 479* has no application to the officers and employees of a private car company, such as a fruit express company, that owns cars and leases them to a common carrier railroad, all its capital stock being owned by the lessee carrier and its employees being treated by the owning road in all respects as its own employees.

*November 1, 1915.*

**485. PASSES TO FAMILIES OF SECRETARIES OF RAILROAD YOUNG MEN'S CHRISTIAN ASSOCIATIONS.**—Members of the family of a secretary of a Railroad Young Men's Christian Association are not entitled to use free passes. (See ruling 208*d*.)

*December 22, 1915.*

**486. DIVISIONS OF JOINT RATES ON RAILWAY FUEL MUST BE FILED WITH THE COMMISSION.**—For the purpose of giving the matter wider publicity, this means is adopted

of directly attending to the Commission's report and order in *Filing of Divisions of Joint Rates Applicable to Railway Fuel*, 37 I. C. C., 265, and to its supplemental report and order in the same proceeding, 38 I. C. C., 169. By these orders *Conference Ruling 209* was modified and carriers were required to file with the Commission sheets or statements showing the divisions of all joint rates on railway fuel; and to file all changes and amendments to such sheets or statements; and to file all new sheets or statements which in any wise affect or determine the division of joint rates on railway fuel. (See ruling 324.)

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*December 23, 1915.*

**487. ERROR IN ISSUANCE OF PASSENGER TICKETS.**  
—*Conference Ruling 481* revised. The contract portion and some of the coupons of a half-fare or lower class ticket were properly punched by the agent of an initial carrier, but the remaining coupons were overlooked. Upon inquiry, *Held*, That while adhering, under *Conference Ruling 277*, to the principle that the initial carrier in such cases must bear the full burden of the mistake of its agent and settle with its connecting lines on the basis of the class of ticket as honored by them, nevertheless, when the conductor of a connecting line honoring the unmarked or unpunched coupons indicates thereon that the contract portion of the ticket was properly marked or punched and that the holder was actually accorded half fare or lower class transportation, such line may accept its proportion of the fare applicable to the transportation so furnished.

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*January 10, 1916.*

**488. RATES BETWEEN POINTS IN THE UNITED STATES AND ADJACENT FOREIGN COUNTRIES.**—In the absence of a published through rate between a point in the United States and a point in an adjacent foreign country, the published through rate between the border gateway and the domestic point should be applied in constructing the total rate. In the absence of a published through rate between the border gateway and the domestic point the lowest combination of legal rates should be applied. (See ruling 220g.)

*February 18, 1916.*

**489. INTEREST UPON OVERCHARGE CLAIMS.**—*Conference Ruling 464* amended and restated.

Interest on an overcharge (by which is meant the amount collected on a shipment in excess of the legally published rate) accrues from the date of its collection by the carrier whether arising from an error in rate, weight, or classification.

The Commission does not regard it as unlawful for a claimant to accept in satisfaction of his claim the ascertained amount of an overcharge without interest; and the Commission is of the opinion that when such a refund is made by the carrier within 30 days after the improper collection of the overcharge, it may be regarded, in accordance with a well-established usage, as a cash transaction, upon which interest does not accrue.

The views expressed in this ruling shall be understood as applying to all pending and unsettled overcharge claims and to those arising in the future, but not as authorizing or requiring the reopening of any claim which has been settled and closed by the acceptance by a claimant of the amount of an overcharge without interest. (See *Scattergood & Co. v. L. S. & M. S. Ry. Co.*, U. R. Op. 2040; and *International Lumber Co. v. C. N. Ry. Co.*, 40 I. C. C., 283.)

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*March 13, 1916.*

**490. TRACKAGE RIGHTS OVER AN INDUSTRIAL ROAD.**—Upon inquiry by a common carrier respecting proposed trackage rights over a portion of a logging road, *Held*, That if the common carrier uses the logging road in interstate commerce or as a highway for interstate commerce the logging road must keep its accounts as required by section 20 of the act; it will also be subject to the provisions of the safety-appliance acts.

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*March 23, 1916.*

**491. EXCHANGE OF SERVICES UNDER CONTRACTS BETWEEN RAILROADS AND TELEGRAPH, TELEPHONE, OR CABLE COMPANIES.**—Upon inquiry whether under section 1 of the act<sup>1</sup> a railroad may contract with a telegraph company to transport the latter's property, either for use on the railroad's line or elsewhere, at a rate different to the

regularly published rate for such transportation: *Held*, That such an exchange of services may lawfully be made only upon the basis of the legally established rates of the railroad and on the basis of the fixed charges of the telegraph company regularly exacted of other customers for similar services; except that such carriers may so contract, without reference to said lawful rates and charges, for the transportation of the property of the telegraph company over the line of the contracting railroad company for use along the latter's line and in the construction, improvement, or operation thereof; that is to say, when such transportation is not conducted by said railroad as a common carrier. (Amends and modifies ruling 219 and cancels ruling 364; see also ruling 305. This ruling cited in *Chicago G. W. R. Co. v. Postal Telegraph Cable Co.*, 245 Fed. 600.)

1. Section 1 provides: "That nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for an exchange of services."

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*April 4, 1916.*

**492. REFUND OF FARE FOR CHILD UNDER FIVE YEARS OF AGE.**—A passenger traveling with a child under five years of age intended to purchase one ticket, the tariffs providing for the free transportation of children under that age. The carrier's agent, however, sold the passenger two full-fare tickets and they were used for the journey. *Held*, That the participating lines might join in refunding the fare paid for the child. (Compare ruling 163.)

**493. FREE TRANSPORTATION TO INSURANCE SUPERVISORS.**—Insurance supervisors carried on the pay rolls of a railroad and devoting only a part of their time to the railroad service, but who are subject to call, may lawfully use trip passes when traveling exclusively on the business of the railroad. (See rulings 208, 412, and 426.)

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*April 22, 1916.*

**494. RESPONSIBILITY OF INITIAL CARRIER FOR STOLEN TICKETS HONORED BY ITS CONNECTIONS.**—

Certain passenger tickets stolen from an initial carrier were later honored by the connecting lines. *Held*, That the initial carrier is responsible to its connections for their revenue, the tickets showing its approved stamp although fraudulently affixed thereon.

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*April 27, 1916.*

**495. REFUND OF PASSENGER FARE IN EXCESS OF SERVICE RENDERED.**—A passenger, applying for second-class carriage, was handed a first-class round-trip ticket from Minneapolis to San Francisco and return, and paid the tariff fare therefor. Under the belief that it was a second-class ticket he traveled in that class to Los Angeles, and then presented the unused portion of the ticket for redemption: *Held*, That refund should be made in the difference between the fare paid for the ticket and the fare applicable to a second-class one-way ticket from Minneapolis to Los Angeles.

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*July 3, 1916.*

**496. RATES BASED ON VALUE OF PROPERTY AS DECLARED AT THE TIME AND PLACE OF SHIPMENT.**—A tariff provided that—

carriers, parties hereto, have no means of determining value of live stock when offered for shipment and live stock will not be accepted for transportation unless the shipper or his agent declares in writing the valuation at time and place of shipment. The rates named in tariff shall be applied on animals, the actual value of which does not exceed the following amount.

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Live stock valued at \$5 per head at the shipping point was sold at destination at an average price exceeding that amount. Upon inquiry whether the charges should be assessed at the rate applicable to live stock of the value at which it was sold at destination: *Held*, That under such a tariff provision the value declared by the shipper at the time and place of shipment is the basis for determining the rate applicable and that a reasonable difference between that value and the value at destination is not evidence of a misstatement of value at the point of origin. (See rulings 58 and 295; also *In re The Cummins Amendment*, 33 I. C. C. 682, 693.)

*October 3, 1916.*

**497. APPLICATION OF AVERAGE AGREEMENT UNDER CODE OF UNIFORM DEMURRAGE RULES.**—A consignee at St. Louis, under proper tariff authority, reconsigned a shipment to a storage warehouse on the tracks of a terminal carrier at that point. Upon inquiry, *Held*, That as the terminal carrier had an independent average demurrage agreement with the storage warehouse, it must treat the storage warehouse as the consignee within the meaning of *Conference Ruling 463*. (See also ruling 409.)

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*October 16, 1916.*

**498. APPLICATION OF AVERAGE AGREEMENT UNDER CODE OF UNIFORM DEMURRAGE RULES.**—Before cars loaded by an industry were switched from its warehouse their contents were sold to another shipper to whom bills of lading were issued by the carrier: *Held*, That the average agreement between the carrier and the industry may lawfully be applied. (See rulings 409 and 463.)

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*November 8, 1916.*

**499. CANCELED TARIFFS NEED NOT BE KEPT POSTED.**—Under section 6 of the act to regulate commerce, carriers are required to keep posted for public inspection only their current tariffs and tariffs filed to become effective in the future.

**500. RELEASED RATES UNDER CUMMINS AMENDMENT AS FURTHER AMENDED.**—Under the so-called Cummins amendment as further amended, carriers when authorized or required by the Commission may establish rates on property, other than ordinary live stock, based upon its agreed or declared value even though the value so declared or agreed to may be less than the true value of the property transported.

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*November 28, 1916.*

**501. ISSUING CARRIER'S RESPONSIBILITY UNDER JOINT RATE PUBLISHED WITHOUT PROPER CONCURRENCE.**—An originating carrier having published a joint

through rate without the concurrence of a connecting line, the higher combination of intermediate rates was applied. Following *du Pont de Nemours Powder Company v. Wabash Railroad*, 33 I. C. C., 507, *Held*, That the through rate should have been applied, the originating carrier assuming the difference between that rate and the higher combination rate without assistance from the other carriers participation in the movement (See rule 68 of Tariff Circular 18-A.)

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*January 8, 1917.*

**502. ROUTING OF SHIPMENTS BY CONSIGNEES.**—In view of the provisions of an act of Congress entitled "An act relating to bills of lading in interstate and foreign commerce," approved August 29, 1916, *Conference Rulings 332, 453, and 482* are rescinded.

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*February 26, 1917.*

**503. HANDLING OF CIRCUS AGENTS AND ADVANCE CARS.**—While the advance cars of a circus may properly be handled on regular trains under special circus rates, the use of special circus mileage books should be confined to employees and circus members accompanying the circus train and should not be used on regular passenger trains.

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*March 12, 1917.*

**504. RELEASED AND DECLARED VALUE RATES.**—Upon the petition of a shipper to require a carrier to establish rates depending upon the declared or agreed value of the property transported, a hearing will be had and an order thereon will issue. Upon a petition by a carrier for authority to establish such a rate, the Commission will investigate its reasonableness and propriety in such manner and by such means as it may deem proper; any rate so authorized must be published and posted as required by law and will be subject to suspension on protest and to attack on complaint as in the case of other rates.

*April 2, 1917.*

**505. TRAFFIC PASSING THROUGH THE UNITED STATES FROM A POINT IN AN ADJACENT FOREIGN COUNTRY TO A POINT IN AN ADJACENT FOREIGN COUNTRY.**—With respect to a shipment moving from a point in Canada through the United States to Boston consigned for export to a point in Nova Scotia: *Held*, That, following the ruling announced in *Seymour v. M. L. & T. R. R. & S. S. Co.*, 35 I. C. C., 492, and *Canales v. G., H. & S. A. Ry. Co.*, 37 I. C. C., 573, the Commission is without jurisdiction. Rescinded. See Ruling 514.

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*April 17, 1917.*

**506. DEMURRAGE UNDER AVERAGE AGREEMENT ON STATE AND INTERSTATE SHIPMENTS.**—Where the demurrage rules and rates on state and interstate traffic differ, *Held*, That credits on state traffic under an average agreement may not lawfully be offset against the debits on interstate traffic.

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*April 23, 1917.*

**507. SHIPMENTS HELD AT TRANSIT POINT BEYOND TRANSIT PERIOD BECAUSE OF INABILITY OF CARRIER TO SUPPLY CARS.**—Certain shipments were placed in transit under a tariff rule providing, in substance, that the billing would not be recognized for warehousing and reshipping purposes with respect to shipments on hand at the close of August 31 of any year. Upon inquiry whether, the carrier being unable to comply with a demand for cars made only a day or two before the clearing day, the shipper is entitled to a refund of the difference between the through rate and the sum of the local rates to and from the transit point: *Held*, it not being shown that the carrier failed in its duty to supply cars upon reasonable request, the refund may not be made. (See *Peck v. A., T. & S. F. Ry.*, U. R. Op. A-923.)

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*May 12, 1917.*

**508. FILING OF INFORMAL COMPLAINTS. STATUTE OF LIMITATIONS.**—Section 16 of the act to regulate com-

merce, as amended, provides that "All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues and not after." In *Blinn Lumber Co. v. Southern Pacific Co.*, 18 I. C. C., 430, it was decided that the two-year period is to be computed from the date of the delivery of the shipment.

In all cases the complaint must be filed by or on behalf of the party who has borne the transportation charges as such. *International Agricultural Corporation v. Louisville & Nashville Railroad Co.*, 29 I. C. C., 391, and *Oden & Elliott v. Seaboard Aid Line Railway*, 37 I. C. C., 345.

In order that it may operate to stay the statute of limitations, an informal complaint must be filed with the Commission within two years from the time the cause of action accrues, and (a) must name the defendant carrier or carriers; (b) must allege a violation of the act and ask affirmative relief; and (c) must describe the shipment by naming the point of origin and destination, the consignor and consignee, the date of the shipment, the initials and number of the car, in the case of carload shipments, or (d) must give such available information as may be reasonably necessary to enable the defendant carrier or carriers to identify the shipment. A notification to the Commission of the possibility or intention of filing a complaint for the recovery of damages is not such a filing as is contemplated by the statute.

An informal complaint embodying the information above indicated should be filed with sufficient copies to enable the Commission to send one copy to each defendant carrier as notice to it of the complaint, retaining one copy for its own use.

When a complaint for reparation has been before the Commission informally on the special docket or otherwise, and the parties have been notified by the Commission that the complaint is denied or that it can not be determined informally, or when the parties voluntarily withdraw the complaint from informal consideration, it may not be reconsidered informally if not again submitted to the Commission within six months from the date of such notification or withdrawal, nor may it be filed as a formal complaint unless so withdrawn: *Provided, however*, That this rule does not apply when the two-year period from the date of delivery of the shipment has not expired. (See rule III of the Rules of Practice.) Modified ruling 516.

*June 19, 1917.*

**509. DRAYAGE EXPENSE RESULTING FROM ERRO-NEOUS TERMINAL DELIVERY.**—*Conference Ruling 474-b* amended and 392 rescinded.—In case the consignee elects to accept the shipment at the terminal where delivery has been erroneously offered rather than insist upon delivery at the terminal designated, the shipper or the consignee is entitled to recover damages in the sum of the difference between the expense of drayage actually incurred at a reasonable charge therefor and the expense which would have been incurred if proper delivery had been effected by the carrier. The carrier responsible for misrouting the shipment, resulting in a claim of this character, may reimburse the shipper or consignee entitled to reimbursement wholly at its expense without a specific order of the Commission in each case. In pursuing this course carriers must accept full responsibility for the correct application of the rule and must make reports to the Commission in accordance with its order of July 3, 1917.

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*June 21, 1917.*

**510. WRITTEN NOTICE TO CARRIER CONSTITUTES PRESENTATION OF CLAIM.**—Modifying conference ruling 456. It is the view of the Commission that the provision in the uniform bill of lading requiring that claims for loss, damage, or delay must be made in writing within a specified period is legally complied with when the shipper, consignee, or the lawful holder of the bill of lading, within the period specified, files with the agent of the carrier, either at the point of origin or the point of delivery of the shipment, or with the general claims department of the carrier, a claim or a written notice of intended claim describing the shipment with reasonable definiteness. (See *G. F. & A. Ry. v. Blish Milling Co.*, 241 U. S., 190.)

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*July 19, 1917.*

**511. PASSES TO FURLOUGHED EMPLOYEES ENTERING MILITARY OR NAVAL SERVICE OF THE UNITED STATES.**—Upon inquiry: *Held*, That employees of common carriers who enter the military or naval service of the United States in the present war and who are carried on the records of

the carriers as furloughed employees, to be restored to the carrier's service at the termination of the war, are furloughed employees within the meaning of section 1 of the act to regulate commerce and the carriers may lawfully grant free passes to dependent members of their families.

*July 20, 1917.*

**512. INDUSTRIAL SWITCHING TRACKS.**—Conference Ruling 427 modified and amended.—A carrier may not lawfully build a switch track inside the plant boundary of an industrial company without adequate compensation therefor. And an agreement by the industry to give the carrier all or a part of its traffic as compensation for the building of the track is not regarded as "adequate compensation." (See Ruling 110.)

**513. EXPRESS COMPANIES MAY NOT CARRY PROPERTY FOR OFFICERS AND EMPLOYEES EXCEPT AT PUBLISHED RATE.**—Upon inquiry, *Held*, That the act to regulate commerce as amended does not authorize an express company subject to the act to carry property either for its own officers or employees or for the officers and employees of other common carriers, except at its legally published rate. (See rulings 157, 208b, and 361.)

**514.** In conference on March 25, 1918, the Commission approved the following ruling rescinding conference ruling 503, concerning the **HANDLING OF CIRCUS AGENTS AND ADVANCE CARS**:

In the light of changed practices, conference ruling 503 is rescinded pending the issuance of a further ruling if that be found necessary. The present practices may be continued pending such further ruling.

**515.** In conference on May 4, 1918, the Commission approved the following interpretation of conference ruling 314, concerning the **COLLECTION OF UNDERCHARGES**:

**RULING 314 INTERPRETED.**—In conference ruling 314 the Commission held it to be the duty of common carriers to exhaust their legal remedies to collect undercharges. But the Commission has pointed out from time to time and now holds that this ruling does not require the filing of a suit where the party liable for the undercharge cannot be located, or service cannot be made, or where upon investigation by the carrier in

good faith it is found that legal process would be futile and ineffectual.

**516.** The following Conference Ruling has been approved and adopted:

**RIGHT OF ACTION TO RECOVER REPARATION ON ACCOUNT OF UNLAWFUL CHARGES ACCRUES WHEN THEY ARE PAID.**—The Supreme Court of the United States in *U. S. ex rel. v. Interstate Commerce Commission* decided on April 29, 1918, held that the right to recover reparation on account of unlawful freight charges accrues when they are paid, and not upon the delivery of the shipment as held by the Commission in *Blinn Lumber Co. v. S. P. Co.*, 18 I. C. C., 430.

The Commission will therefore entertain petitions for the reconsideration of any such formal or informal claims that were filed within two years from the time the charges were paid and were denied by the Commission under the ruling of the *Blinn* case. Such petitions should be filed not later than December 31, 1918. Modifying Conference Ruling 508.

**517.** In conference on April 14, 1919, the Commission approved the following restatement of conference ruling 362:

**ASSIGNMENT OF CLAIM.**—In awarding reparation the Commission will recognize an assignment by a consignor to a consignee or by a consignee to a consignor, but will not recognize an assignment to a stranger to the transportation records. The phrase "stranger to the transportation records," as here used, has no reference to the lawful rights of an undisclosed principal, either in matters of reparation before the Commission or the adjustment by the carriers of plain undercharge or overcharge claims. Amending ruling 246. See *Oden & Elliott v. S. A. L.*, 37 I. C. C., 345, and *Robinson Co. v. Am. Express Co.*, 38 I. C. C., 735.

**518.** The Commission in conference October 6, 1919, adopted the following conference ruling which rescinds Rulings 405 and 473.

**DEMURRAGE AND STORAGE RULES.**—Upon inquiry and to remove the confusion that exists among carriers and shippers, *Held*, That off-track storage not in transit, track storage and demurrage are controlled by the tariffs in effect contemporaneously with the accrual of these services, and therefore are subject to such changes as lawfully may be made in the applicable tariffs during the period of accrual; that off-track storage in transit is controlled by the tariffs in effect upon the date of shipment. (Rescinding Conference Rulings 405 and 473.)

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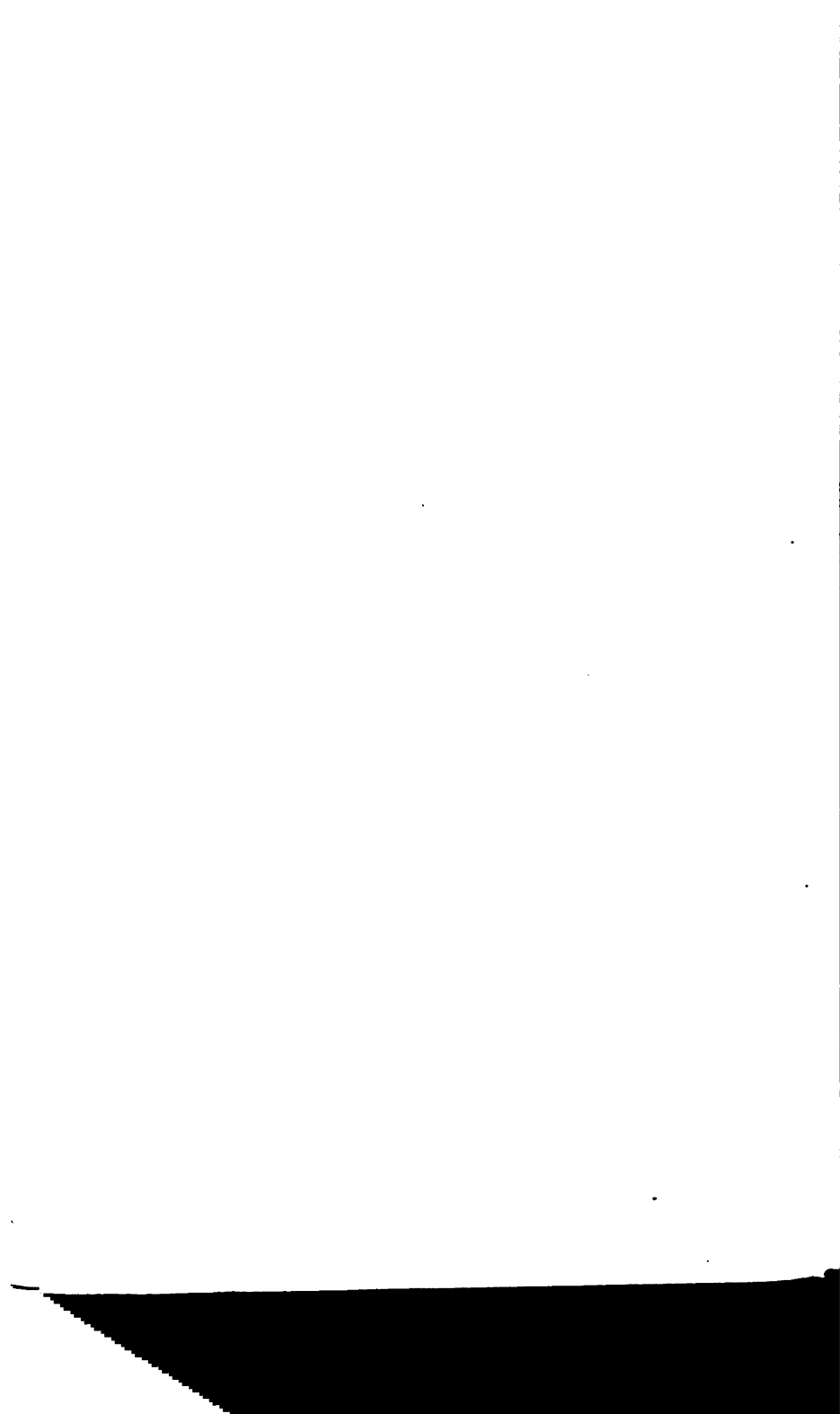
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